In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. CACE [redacted]

[redacted] and [redacted]

Appellants,

v.

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

Appellees.

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

REPLY BRIEF OF APPELLANTS

Respectfully submitted,

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KEY:

The conventions of the Initial Brief are used in the Reply. The late Frank Plati and his daughter, [redacted] are referred to collectively as "the Owners." The Appellee, HSBC Bank USA, is referred to as "the Bank."

STATEMENT OF THE CASE AND FACTS
(Reply to Brief of Intervenor)

Although the Answer Brief of the Third Party Purchaser, Signature RE Holdings I, LLC ("Signature") omits a section entitled "Statement of the Facts," its brief improperly injects a number of "facts" that are not in the record before this Court:

- That it invested over $100,000 to repair the subject property and what those repairs were;
- That it secured a buyer and had the property under contract for sale;
- That Signature did not know of this appeal until a title company conducted a title search;
- That the buyer "walked" when the Owners were granted "extension after extension."[1]

These are not only non-record "facts," but are irrelevant to any issue on appeal. Obviously intended to garner sympathy (despite the fact that all of these events would have been well after Ms. [redacted] challenged the judgment in this case), or to provoke this Court's ire,[2] they should be stricken.

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[1] Intervenor's Brief, p. 3.

[2] Aside from these statements, the Intervenor's Brief is a study in hyperbolic and vitriolic *ad hominem* attacks that, unfortunately, have become all too common in litigation—particularly foreclosure litigation—and should not be tolerated.

THE PARTIES

Both the Bank and Signature argue that [redacted] was properly served and cannot later challenge the summary judgment because he was defaulted and was not included as a party to Ms. [redacted] motions.[3] Signature goes so far as to claim that [redacted] is not a proper party to this appeal.[4]

Although not an issue on this appeal, [redacted] was neither properly named nor served as a defendant because he was delivered process for an "unknown tenant" of the subject property when he did not, in fact, live there. If he has a stake in this case, it is as a potential heir to the property of his grandfather, Mr. Plati.[5]

Despite being an improper party below, [redacted] is a proper party to this appeal, at least as an appellee. Fla. R. App. P. 9.020(g). He is, however, more appropriately aligned as an appellant because it is in his interest that his mother retain the property. *Premier Indus. v. Mead*, 595 So. 2d 122, 124 (Fla. 1st DCA 1992) (the scheme and purpose of the appellate rules and the commentary is to align all parties contesting an order on appeal as "appellants").

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[3] Bank's Answer Brief, p. 3, n.2; Signature's Answer Brief, p. 16, n. 11.

[4] Signature's Answer Brief, p. 23, n. 17.

[5] Given that the death of Mr. Plati (the primary defendant) was suggested on the record as early as April 22, 2013 (and again in the Initial Brief), and yet the Bank has still not moved to substitute Mr. Plati with his estate, the case should be dismissed as to Frank Plati. Fla. R. Civ. P. 1.260(a)(1).

SUMMARY OF THE REPLY ARGUMENT

All of the Bank's arguments in its Answer Brief are a repeat of those in its motion to dismiss this appeal for lack of jurisdiction. However, this Court already determined that it has jurisdiction—i.e. that Ms. [redacted] motions to vacate were proper and timely—when the motions panel denied the Bank's motion. To the extent the Court wants to reconsider its ruling, Ms. [redacted] adopts the lengthy memorandum in opposition to the Bank's motion to dismiss this appeal.

Additionally, neither Ms. [redacted] nor her attorney waived the objection to absence of service because the issue was raised as part of the first substantive motion in the case.

The Appellees' arguments as to the alleged absence of excusable neglect and due diligence are inapplicable here because: 1) Ms. [redacted] was never served; and 2) no default was ever entered. Even if Ms. [redacted] were required to show excusable neglect and due diligence, the sworn facts and the record below more than meet the threshold of "colorable entitlement" for an evidentiary hearing on such factors—at a minimum, they show that the case was abandoned by counsel. The Appellees' claim that this Court should infer that Ms. [redacted] intentionally sat on her right to contest jurisdiction—a right they think she must have known about early on—only emphasizes the need for an evidentiary hearing in this case.

ARGUMENT

I. This Court Has Already Determined That It Has Jurisdiction.

The primary arguments in the Briefs of both the Bank and Signature are a nearly verbatim repetition of the Bank's Motion to Dismiss Appeal for lack of jurisdiction.[6] This Court, after consideration of lengthy memoranda (lengthier than the page limitation for a Reply Brief) denied the motion.[7] To the extent that the Court may wish to reconsider its ruling, the Owners would adopt their response to the motion to dismiss[8] as if fully incorporated herein, or in the alternative, would request that they be permitted additional pages for their Reply Brief (in accordance with Fla. R. App. P. 9.210(a)(5)) in order that they may again set forth the law that apparently persuaded the motions panel.

For the Court's convenience, the Owners' previous response is briefly summarized below with references to the text of that response.

A. The judgment was void (rather than voidable) because the Bank's use of substitute service makes actual notice irrelevant.

Ms. [redacted] Motion to Vacate was not untimely because the judgment was void, rather than voidable. This is because, under the cases cited in the Owners'

[6] Appellee's Motion to Dismiss Appeal dated April 30, 2014.

[7] Order of the Court dated June 13, 2014.

[8] Appellants' Resp. to Motion to Dismiss, dated May 22, 2014.

response,[9] actual notice of the lawsuit on the part of a defendant is relevant only to defective personal service, not substitute service as used by the Bank here. Stated differently, substitute service on a person not authorized to receive such service is the same as service on the wrong person—i.e. a "total want of service" on the actual defendant.

B. In the alternative, the Bank's Notice of Intent to File Supplemental Affidavit and Motion to Cancel the Sale prevented the judgment from being rendered until August 6, 2012.

Even if the judgment was voidable rather than void, the Motion to Vacate was made within one year of August 6, 2012—the date the Bank abandoned what was effectively a motion to rehear its own judgment—to wit: its request to stay the effect of the judgment while it investigated the propriety of its own summary judgment affidavit. (This purported investigation either never reached a conclusion or its findings were never reported to the court).[10]

While the Bank's filing was entitled Notice of Intent to File Supplemental Affidavit of Indebtedness, the Court should treat it as a timely filed motion for

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[9] *See 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 (Fla. 4th DCA 1981); *Milanes v. Colonial Penn Ins. Co.*, 507 So. 2d 777 (Fla. 3d DCA 1987); *Weiss v. Mashantucket Pequot Gaming Enter.*, 935 So. 2d 69 (Fla. 3d DCA 2006); *Seymour v. Panchita Inv., Inc.*, 28 So. 3d 194 (Fla. 3d DCA 2010); *Sewell v. Colee*, 132 So. 3d 1186 (Fla. 3d DCA 2014); Appellants' Resp. to Motion to Dismiss, pp. 9-13.

[10] *See*, Appellants' Resp. to Motion to Dismiss, pp. 13-14.

rehearing under Fla. R. Civ. P. 1.530, not only because such treatment is proper under the case law,[11] but because it would be inequitable for the Bank to use its own inaction to run out the clock on Ms. [redacted] right to challenge the judgment—the very same judgment that the Bank itself was questioning.

This same result—the suspension of rendition of the judgment until the Bank abandoned its investigation—is compelled by § 702.07, Fla. Stat.[12] The language of this statute has been interpreted to mean that a stay of a foreclosure sale rescinded the judgment and required its re-entry prior to execution.[13]

C. The second Motion to Vacate was not a successive motion relitigating the same issue.

The Bank's fallback jurisdictional argument was that Ms. [redacted] second Motion to Vacate was unauthorized because, according to the Bank, it was a successive motion relitigating the same issues settled by the first motion to vacate. The Owners pointed out that this argument was without merit because the first motion to vacate was not denied on the merits, but rather, based on the absence of

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[11] *See Garcia v. Stewart*, 906 So. 2d 1117 (Fla. 4th DCA 2005); *Estate of Willis v. Gaffney*, 677 So. 2d 949 (Fla. 2d DCA 1996).

[12] *See*, Appellants' Resp. to Motion to Dismiss, p. 15.

[13] *See Grace v. Hendricks*, 140 So. 790, 796 (Fla. 1932); Appellants' Resp. to Motion to Dismiss, p. 15. In footnote 4 of its Brief, the Bank merely gainsays this point without citation to any authority.

an attorney who was not even an attorney of record for Ms. [redacted][14] *Nichols v. Hepworth*, 604 So. 2d 574 (Fla. 4th DCA 1992) (where second motion to vacate sought to vacate the ruling on the first motion to vacate, the motion was not barred as a successive motion); *Intercontinental Properties, Inc. v. U.S. Sec. Services, Inc.*, 515 So. 2d 321 (Fla. 3d DCA 1987) (reversing a denial of a second motion where, like here, the first motion was entered without proper notice).[15]

This distinguishes this case from decisions where a party merely renewed a 1.540 motion—such as the case cited by the Bank: *Intercoastal Marina Towers, Inc. v. Suburban Bank*, 506 So. 2d 1177, 1179 (Fla. 4th DCA 1987).

[14] *See*, Appellants' Resp. to Motion to Dismiss, pp. 17-18.

[15] *See*, Appellants' Resp. to Motion to Dismiss, p. 19.

II. Neither Ms. [redacted] Nor Her Counsel Waived The Objection to the Absence of Service.[16]

The Bank claims that Ms. [redacted] waived the improper service because she did not raise the defense either in a pre-answer motion to dismiss or in an answer as stated in Fla. R. Civ. P. 1.140(h).[17] Obviously, the point of that rule is that, if a defendant files a pre-answer motion to dismiss or an answer without raising lack of service, the issue is waived. Neither Ms. [redacted] nor her attorney filed such a motion or pleading.

The Bank's interpretation—that the issue may only be raised in documents with that title—would mean that judgments obtained without service (such as the one here) would be immune from attack, because such a hapless defendant could never file a motion to dismiss or answer. The entire body of case law regarding void and voidable judgments would be senseless, because a Rule 1.540 motion is not a motion to dismiss or an answer.

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[16] The Bank also raised a version of this argument in its Motion to Dismiss, even though it is not, strictly speaking, an argument that this Court does not have jurisdiction. In the version adapted for its Answer Brief, the Bank dropped its argument that jurisdiction was waived by the notice of appearance filed by [redacted] attorney. Presumably, it discontinued this argument because it is black letter law that an attorney's notice of appearance does not by itself waive an objection to defective service. [16] *See*, Appellants' Resp. to Motion to Dismiss, p. 20.

[17] Bank's Answer Brief, p. 13.

III. Although a Showing of Excusable Neglect and Due Diligence is Not Required, Ms. [redacted] Demonstrated Colorable Entitlement to an Evidentiary Hearing on the Issue.

Both the Bank and Signature contend that, even if the Motion to Vacate was within the time limits of Rule 1.540, she still waived the service issue because, in their opinion, she was too slow to assert her rights.[18]

First, neither the Bank nor Signature disputed Ms. [redacted] point that she is not required to show that she met the criteria for vacating a default—e.g. excusable neglect or a meritorious defense—where there has been no default.[19] *See Green Solutions Intern., Inc. v. Gilligan*, 807 So. 2d 693, 696 (Fla. 5th DCA 2002) (where judgment does not meet due process requirements, it is unnecessary to demonstrate the existence of a meritorious defense, excusable neglect and due diligence). Nor are they a consideration when the motion to vacate is based upon a lack of service, rather than a failure to timely answer after being properly served. *See Bennett v.* [redacted] *Bank & Trust Co.*, 50 So. 3d 43, 46 (Fla. 3d DCA 2010) ("Where no *in personam* jurisdiction is obtained over a defendant, the defendant is not required to demonstrate a meritorious defense to set aside the default.").

[18] The Bank argues this as a waiver (Bank's Answers Brief, p. 14) while Signature argues this under the rubric of a default judgment, combining the separate concepts of excusable neglect and due diligence into a single argument (Signatures' Answer Brief, pp. 19-25).

[19] Initial Brief, pp. 14, 16.

A. The acts of [redacted] counsel can constitute excusable neglect, particularly where the attorney has abandoned the case.

Even if Ms. [redacted] were required to show excusable neglect and due diligence, the facts are sufficient to show a colorable entitlement to an evidentiary hearing on the subject.

First, contrary to Signature's argument, the acts of [redacted] counsel can constitute excusable neglect. *See Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985) (dismissal due to attorney's neglect reversed because "where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation the matter should be permitted to be heard on the merits"); *Trans-World Realty Corp.-Plantation v. Realty World Corp.*, 507 So. 2d 1201, 1202 (Fla. 4th DCA 1987) (same). In fact, when this Court relied upon the case cited by Signature[20] in quashing an order to set aside a default judgment, it was reversed by the Florida Supreme Court. *Rogers v. First Nat. Bank at Winter Park*, 223 So. 2d 365, 367 (Fla. 4th DCA 1969) *rev'd*, 232 So. 2d 377 (Fla. 1970).

[20] *Sun Fin. Corp. v. Friend*, 139 So. 2d 484 (Fla. 3d DCA 1962); Signature Answer Brief, p. 17.

Here, the attorney's neglect would not be in failing to respond in some way to the unverified Complaint—Ms. [redacted] attorney moved for an extension of time to respond.[21] Any neglect would have been in abandoning the case afterwards and permitting judgment to be entered even when no default had been entered. In fact, the Third District case cited by Signature for the proposition that the acts of Ms. [redacted] attorney cannot constitute excusable neglect[22] was later specifically found inapplicable by that same court when, as here, there is a claim of abandonment by counsel. *Cruz v. Caribbean Spring Vill.*, 944 So. 2d 1161, 1162 (Fla. 3d DCA 2006). That case relied upon this Court's decision in *Yusem v. Butler*, 683 So. 2d 1170, 1171 (Fla. 4th DCA 1996) (attorney's abandonment of clients constituted excusable neglect).

[21] Defendants Frank Plati & [redacted] [redacted] Motion for Extension of Time to Respond to Plaintiff's Complaint, dated March 29, 2010 (App. 41).

[22] *Herrick v. Southeast Bank, N.A.*, 512 So. 2d 1029 (Fla. 3d DCA 1987); Signature's Answer Brief, p. 18, n. 14. In this footnote, Signature again complains that a reversal would "visit [redacted] attorneys' sins on Signature." It bears repeating that Signature was aware of these "sins" when it abandoned its request to be refunded the purchase price for the home and, according to Signature's non-record facts, proceeded with its plans for the home without checking the docket for an appeal.

Here, Ms. [redacted] sworn motion,[23] together with the absence of activity obvious from the court file itself, establish a sufficient factual basis to merit an evidentiary hearing on Ms. [redacted] excusable neglect (due to an abandonment by counsel).

B. Even if the acts of counsel were insufficient to show excusable neglect and due diligence, the inferences of fact suggested by Appellees still require an evidentiary hearing.

Signature and the Bank assert that, even if Ms. [redacted] attorney abandoned the case, she had a duty to independently know that service was deficient, to monitor and spur her attorney into bringing that issue to the attention of the court—and even file something herself despite her belief that she was being represented.[24] Not surprisingly, there is no citation to case law for this proposition.

Nevertheless, starting from this assumption, they then seek to persuade this Court that Ms. [redacted] did, in fact, know from the beginning that the Bank had failed in its attempt at substitute service and that she deliberately delayed contesting the issue. Signature, in particular, spends pages painting Ms. [redacted] as an incredibly astute litigant who manipulated the system (including, apparently, the

[23] 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, ¶ 8 (App. 169) (alluding to fact that previous attorney did not attend the case after filing motion for withdrawal).

[24] Bank's Answer Brief, p. 14; Signature's Answer Brief, p. 19.

clever use of her own counsel's shortcomings) to postpone the outcome at any cost.[25]

That the Bank and Signature are asking this Court to make factual determinations based on inferences they have drawn about Ms. [redacted] (and that Signature's diatribe would be more fitting for a closing argument than an appellate brief) only underscores the fact that the trial court skipped a critical step—the

[25] Signature's Answer Brief, pp. 6, 19-25. Many of Signature's footnoted accusations are quite strained. For example, it accuses Ms. [redacted] of lying when she first said that the Bank was not working with her on HAMP loss mitigation efforts and then later said she had acted in good faith in her dealing with the Bank to save her home. (Signature's Answer Brief, p. 15, n. 9). First, it is completely consistent to say that she was acting in good faith to save her home, but the Bank was not. Second, in context, she simply said that the Bank had changed its story when it moved to reset the sale. It had canceled the sale because it was troubled by its own summary judgment affidavit—not, as it later represented, because it was working on a HAMP modification. (App. 122); *compare* Plaintiff's Motion to Cancel the Foreclosure Sale (App. 89) *with* Motion to Reset Foreclosure Sale Date (App. 97).

Similarly, Signature's accusation that Ms. [redacted] was not truthful in saying that she did not reside at the property at the time of service because she later referred to it as her "home" is nonsensical. (Signature's Answer Brief, p. 15, n. 9). To the extent that "home" implies a current residence, her later statements arise from, and refer to, a different time period—not the time of service.

Citing to a Rule of Judicial Administration promulgated nearly two years after service of the judgment in this case, Signature argues that the Bank complied with the service rules by sending it to the subject property address (Signature's Answer Brief, p. 20, n. 15). Not only had her attorneys' motion to withdraw not yet been granted, there is no evidence that the subject property had ever been her residence, much less, her "last known address." Notably, the motion to withdraw did not include the client's last known address as required by Fla. R. Jud. Admin. 2.505, but indicated that it was served upon Mr. Plati at a post office box (App. 57-58).

evidentiary hearing to which Ms. [redacted] was entitled. Whether she learned of the judgment and her right to challenge at some earlier date would be an issue to be determined at the trial court level. *Franklin v. Franklin*, 573 So. 2d 401, 403 (Fla. 3d DCA 1991) (Ignorance is an acceptable basis for finding excusable neglect and due diligence, and all such questions "must be evaluated in terms of the particular facts of the case under consideration.").

It is the function of the trial court, sitting as the factfinder, to weigh evidence, evaluate the credibility of the witnesses during cross-examination, and draw the inferences that are appropriate. In contrast, this Court's narrow function is to determine whether Ms. [redacted] motions demonstrated "colorable entitlement" to relief. *SunTrust Bank v. Puleo*, 76 So. 3d 1037, 1039 (Fla. 4th DCA 2011) (If the allegations in the moving party's motion for relief from judgment raise a colorable entitlement to Rule 1.540 relief, a formal evidentiary hearing on the motion, as well as permissible discovery prior to the hearing, is required.).[26]

[26] Signature also argues that Ms. [redacted] claim that the Bank committed fraud on the court was untimely (Signature's Answer Brief, pp. 13-15). Although her motion to vacate also raised the issue of fraud on the court, she did not raise that on appeal. This is not to say that she concedes that there were no irregularities with Jeffrey Stephan's affidavit (among other acts of unclean hands) or that she would not be including these as affirmative defenses if the judgment is reversed, only that

CONCLUSION

The Appellants request that the orders 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 August 25, 2014

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they were not raised as a reason for reversal. Accordingly, Signature's arguments regarding fraud are not addressed here because they are irrelevant.

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 August 25, 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 August 25, 2014.

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