

**IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA SIXTH DISTRICT**

Case No. 6D23-4117
L.T. Case No.: 2022 CA 001370

FLORIDA ASSETS CRM 1, LLC AND WATERVIEW COMMUNITY
HOMEOWNERS ASSOCIATION 2, LLC,

Appellants,

v.

SPECIALIZED LOAN SERVICING, LLC,

Appellee.

**On Appeal from the NINETH Judicial Circuit
in and for OSCEOLA County, Florida**

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Record Citation and Statement of the Court's Lack of Jurisdiction

This is an appeal of a non-final Order denying the Appellant, Florida Assets CRM 1 LLC's Motion to Quash Service of Process ("Motion to Quash"). This Court does not have jurisdiction pursuant to Fla. R. App. P. 9.130(a)(3)(C)(i).¹

The Appellee will refer to the Appellant, Florida Assets CRM 1 LLC, as either Appellant or "CRM 1 LLC."

The Appellee will cite to the Appellant's Amended Appendix filed on or about May 8, 2024 to the Initial Brief on appeal with an "App." followed by followed by the page to which the Appellee is referring; for example: (App. pg. __).

Preface

Appellant challenges the denial of its Motion to Quash in the underlying mortgage foreclosure action. (App. pg. 478-479). Appellee objects to Appellant's Statement of the Case and Facts

¹ A separate section in this brief will be devoted to explaining the Court's lack of Jurisdiction, see argument section I regarding this Court's lack of jurisdiction to consider Appellant's appeal.

because it omits and mischaracterizes relevant information and, therefore, provides its own Statement for this Court's review.

B. Nature of the Case

This is an action to foreclose a note and recorded mortgage ("Note and "Mortgage," respectively) on a piece of real property located at 2363 Ballard Cove Road, Kissimmee, Florida ("Subject Property") (App. pg. 102-149). A civil action summons was issued to Florida Assets CRM 1, LLC on or about September 20, 2022. (App. pg. 201-206). The address listed on the summons for Appellant was 4604 49th Street N167, St. Petersburg, Florida. (App. pg. 201- 206). Returns of non-service were issued regarding attempted addresses 4604 49th Street N167, St. Petersburg, Florida and 6210 44th Street N18, St. Petersburg, Florida. (App. pg. 248-249)

On or about March 20, 2023 Appellee filed in the lower trial Court an affidavit regarding its attempt at service at multiple addresses for Appellant, diligent search and inquiry as to locate Appellant. (App. pg. 292-295). An Affidavit of Publication was filed on or about May 8, 2023, regarding publication of the Notice of Action to Appellant. (App. pg. 333). On or about May 15, 2023, Appellant filed an appearance in this action. (App. pg. 342). On or

about May 15, 2023, Appellant filed a motion for extension of time to file a response. (App. pg. 346). Appellant on or about August 17, 2023, filed a Motion to Quash Service. (App. pg. 412-414). On or about August 21, 2023, the lower trial court entered an order on Appellant's Motion for Extension of Time and indicated that Appellant shall file a response to the complaint no later than August 31, 2023. (App. pg. 415-416)

C. Motion To Quash

Appellant on or about August 17, 2023, filed an unverified Motion to Quash Service regarding service by publication. (App. pg. 412-414). Appellee on or about August 29, 2023, filed its response in opposition to the motion to quash regarding the service by publication. (App. pg. 428-432). A notice of hearing on or about September 28, 2023 was filed for the motion to quash indicating that hearing would occur October 16, 2023. (App. pg. 444-445). Following the October 16, 2023 hearing, on or about November 7, 2023 the lower trial court issued an order indicating that Appellant's "motion to quash service of process is DENIED" and provided 10 days to Appellant to respond to the complaint. (App. pg. 478-479). No transcript of the October 16, 2023, proceedings were

made available to the Appellate Court. (App. p 1-496). On or about November 28, 2023, Appellant filed a Notice of Appeal related to the order denying its Motion Quash. (App. pg. 490-496)

D. The Order Denying the Motion to Quash

As discussed above, the Order Denying the Motion to Quash from the presentation of evidence and argument to the Trial Court. (App. 478-479). The motion at issue is Appellant's Motion to Quash. (App. pg. 412-414). The contextual and factual reference for each of these motions has been discussed above, and further discussion is included in the Argument Section, *infra*. Suffice it to say, the Trial Court, after weighing the evidence and being otherwise fully advised on the pertinent issues, and entered the Order Denying the Motion to Quash. (App. pg. 478-479).

This appeal followed. (App. pg. 490-496)

STANDARD OF REVIEW

It has been previously held that, absent a determination regarding personal jurisdiction, the denial of a motion to quash constructive service is not an appealable nonfinal order. See, e.g., *Konieczpolski v. Stelnicki*, 571 So. 2d 577, 578 (Fla. 5th DCA 1990) (dismissing appeal because Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) does not vest jurisdiction in this Court over nonfinal order denying motion to quash constructive service of process in foreclosure proceeding when order does not determine jurisdiction of the person). "The case law is clear . . . that constructive service by publication under [section 49.011(1), Florida Statutes] cannot confer a court with jurisdiction over a person." *Milanick v. State*, 147 So. 3d 34, 35 (Fla. 5th DCA 2014). Rather, constructive service confers only in rem jurisdiction on the trial court. See *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986). *Archer v. U.S. Bank Nat'l Ass'n*, 220 So. 3d 477, 478 (Fla. 5th DCA 2017).

Generally, the decision of a trial court has the presumption of correctness in appellate proceedings and it is the appellant who bears the burden of making any reversible error "clearly, definitely,

and fully appear.” Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979); Tacher v. Helm Bank, 50 So.3d 1239, 1240 (Fla. 4th DCA 2011).

Appellant must be able to demonstrate the invalidity of the service of process by clear and convincing evidence before the motion to quash could be granted. Service which is regular on its face is presumed valid unless clear and convincing evidence is presented to the contrary. Furthermore, a defendant cannot impeach a summons by simply denying service, but must present 'clear and convincing evidence' to corroborate his denial of service." (quoting Lazo v. Bill Swad Leasing Co., 548 So. 2d 1194, 1195 (Fla. 4th DCA 1989)); Morales L. Grp., P.A. v. Rodman, 305 So. 3d 759, 761 (Fla. 3d DCA 2020); Allstate Mortg. Sols. Transfer, Inc. v. Nationstar Mortg., LLC, 366 So. 3d 1129, 1130 (Fla. 3d DCA 2023)

A trial court's ruling on a legal issue in a motion to quash service of process consists of a question of law subject to a *de novo* standard of review. Hernandez v. State Farm Mut. Auto. Ins. Co., 32 So. 3d 695, 698 (Fla. 4th DCA 2010) (citing Mecca Mutlimedia, Inc. v. Kurzbard, 954 So. 2d 1179, 1181 (Fla. 3d DCA 2007)). However,

the standard of review regarding the trial court's resolution of a factual challenge to constructive service of process focuses on whether there was competent substantial evidence to support the decision of the trial judge. *Giron v. Ugly Mortg., Inc.* 935 So. 2d 580, 582 (Fla. 3d DCA 2006).

“The trial court's decision regarding the admission of testimony is reviewed for abuse of discretion.” *Dorsey v. Reddy*, 931 So. 2d 259, 266 (Fla. 5th DCA 2006) (citing *Shultheis v. Gotlin*, 919 So. 2d 546, 549 (Fla. 5th DCA 2005)). “The court's ruling on an evidentiary matter will be affirmed even if the court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling.” *Dorsey*, 931 So. 2d at 266 (citing *Muhammad v. State*, 782 So. 2d 343, 359 (Fla. 2001)).

SUMMARY OF THE ARGUMENT

I. This Court lacks jurisdiction under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) to review the non-final and non-appealable interlocutory order denying Appellant's Motion To Quash as the order did not determine personal jurisdiction over the person.

II. The Trial Court's findings of fact should not be disturbed based on the inadequate record before this appellate Court.

III. Assuming arguendo that this Court has jurisdiction, and the Appellant has provided this Court with a sufficient record, the Trial Court properly denied the motion to quash as Appellant's motion did not establish by clear and convincing evidence grounds to grant the motion as Appellee complied with the requirements for service by publication.

ARGUMENT

I. THIS COURT LACKS JURISDICTION UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.130(A)(3)(C)(I) TO REVIEW THE NON-FINAL AND NON-APPEALABLE INTERLOCUTORY ORDER DENYING APPELLANT'S MOTION TO QUASH AS THE ORDER DID NOT DETERMINE PERSONAL JURISDICTION OVER THE PERSON.

It has been previously held that, absent a determination regarding personal jurisdiction, the denial of a motion to quash constructive service is not an appealable nonfinal order. See, e.g., *Konieczpolski v. Stelnicki*, 571 So. 2d 577, 578 (Fla. 5th DCA 1990) (dismissing appeal because Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) does not vest jurisdiction in this Court over nonfinal order denying motion to quash constructive service of process in foreclosure proceeding when order does not determine jurisdiction of the person). "The case law is clear . . . that constructive service by publication under [section 49.011(1), Florida Statutes] cannot confer a court with jurisdiction over a person." *Milanick v. State*, 147 So. 3d 34, 35 (Fla. 5th DCA 2014). Rather, constructive service confers only in rem

jurisdiction on the trial court. See *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986). *Archer v. U.S. Bank Nat'l Ass'n*, 220 So. 3d 477, 478 (Fla. 5th DCA 2017).

This Court lacks jurisdiction to review and consider the non-final and non-appealable interlocutory order in that the order did not determine personal jurisdiction over the person. See *Archer v. U.S. Bank Nat'l Ass'n*, 220 So. 3d 477, 478 (Fla. 5th DCA 2017).

Just as in *Archer v. U.S. Bank Nat'l Ass'n*, Appellant is challenging constructive service via publication regarding an alleged failure to comply with the diligent search requirements set forth in sections 49.031 and 49.041, Florida Statutes. *Id.*

Fla. Stat. 49.011 states in part:

“service of process by publication may be made in any court on any party identified in s. 49.021 in any action or proceeding: (1) To enforce any legal or equitable lien or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party on whom process can be served within this state.”

Fla. Stat. 49.021 states in part:

Service of process by publication, upon whom.—Where personal service of process or, if appropriate, service of process under s. 48.194 cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:...

Any corporation or other legal entity....”

Absent a determination regarding personal jurisdiction, the denial of a motion to quash constructive service is not an appealable nonfinal order. See, e.g., *Konieczpolski v. Stelnicki*, 571 So. 2d 577, 578 (Fla. 5th DCA 1990). Following the October 16, 2023 hearing, on or about November 7, 2023 the lower trial court issued an order that indicated that Appellant’s “motion to quash service of process is DENIED” and provided 10 days to Appellant to respond to the complaint. (App. pg. 478-479). Nothing contained in the order indicates a granting of personal jurisdiction over the Appellant.

A litany of similar cases all indicate similar holdings that an appellate court lacks jurisdiction regarding review of a non-final order denying a motion to quash regarding constructive service as

constructive service does not grant personal jurisdiction over the person/entity. See *Byers v. Bank of N.Y. Mellon*, 262 So. 3d 270 (Fla. 5th DCA 2019); *Patel v. Wilmington Sav. Bank, FSB*, 249 So. 3d 778 (Fla. 5th DCA 2019); *Terano Fin., LLC v. Bischoff*, 325 So. 3d 113 (Fla. 5th DCA 2020).

"The rule requires that an interlocutory order on appeal must actually adjudicate and determine the personal jurisdiction issue." *Dexx Med. Indus., CA v. Fitesa Naotecidos S.A.*, 346 So. 3d 1215, 1217 (Fla. 3d DCA 2022). "Under rule 9.130(a)(3)(C)(i), 'jurisdiction of the person' has been interpreted as referring to whether the service of process was proper or whether the long-arm statute has been correctly applied." *Cole v. Posada*, 555 So. 2d 367, 368 (Fla. 3d DCA 1989). *Torres v. Sbe Hotel Grp., LLC*, 2023 Fla. App. LEXIS 8273, *2-3 (Fla. 3d DCA 2023).

As the third District Court of Appeal stated: "We find no basis to invoke this Court's jurisdiction under rule 9.130(a)(3)(C)(i) because there is no language in the challenged orders actually adjudicating and determining personal jurisdiction" *Torres v. Sbe Hotel Grp., LLC*, 2023 Fla. App. LEXIS 8273, *3 (Fla. 3d DCA 2023).

Similarly to the above referenced cases, this Court to should deny review of the non-final non appealable interlocutory order as constructive service did not grant personal jurisdiction, and this Court is without jurisdiction to review the order on appeal.

II. THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE DISTURBED BASED ON THE INADEQUATE RECORD BEFORE THIS APPELLATE COURT.

As a threshold matter, the Trial Court's findings of fact based on verbal stipulations/concession of arguments at hearing, its assessment of the witnesses' credibility, findings of fact and evidence should not be disturbed on the incomplete record before the appellate court. The record does not include a transcript of the from the hearing on October 16, 2023. Appellant's failure to request the transcript and include this transcript in their record precludes the review of the Trial Court's order/findings of fact. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) ("Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context,

neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error."); *Underwood v. Columbia County*, 868 So. 2d 1225, 1226-27 (Fla. 1st DCA 2004) (appellant's failure to file transcript of trial precluded appellate review) (citing *Applegate*); *Gonzalez v. Gonzalez*, 861 So. 2d 109 (Fla. 1st DCA 2003) (same).

In *1321 Whitfield, LLC v. Silverman*, 67 So. 3d 435, 437 (Fla. 2d DCA 2011) the Second DCA affirmed denial of a motion to quash service of process because there was no transcript of the hearing on the motion to quash, thus precluding the appellate court's meaningful review of the trial court's findings, and because service of process by publication was statutorily permitted. See also, *Ortiz v. U.S. Bank Trust N.A.*, 2024 Fla. App. LEXIS 6362, *3-4 (Fla. 2d DCA 2024)

Additionally, the Appellant's statement of facts is not a substitute for a hearing transcript. *Soto v. Soto*, 974 So.2d 403 (Fla. 2d DCA 2007). The decision of the trial court comes to this court clothed in a presumption of correctness, and the burden is on the appellant to

demonstrate reversible error. *Chirino v. Chirino*, 710 So.2d 696 (Fla. 2d DCA 1998). Thus, the Trial Court's order should not be disturbed based upon the inadequate record before the Court.

III. ASSUMING ARGUENDO THAT THIS COURT HAS JURISDICTION, AND THE APPELLANT HAS PROVIDED THIS COURT WITH A SUFFICIENT RECORD, THE TRIAL COURT PROPERLY DENIED THE MOTION TO QUASH AS APPELLANT'S MOTION DID NOT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE GROUNDS TO GRANT THE MOTION AS APPELLEE COMPLIED WITH THE REQUIREMENTS FOR SERVICE BY PUBLICATION.

a. Standard of Review

A trial court's ruling on a legal issue in a motion to quash service of process consists of a question of law subject to a *de novo* standard of review. *Hernandez v. State Farm Mut. Auto. Ins. Co.*, 32 So. 3d 695, 698 (Fla. 4th DCA 2010) (citing *Mecca Mutlimedia, Inc. v. Kurzbard*, 954 So. 2d 1179, 1181 (Fla. 3d DCA 2007)). However, the standard of review regarding the trial court's resolution of a factual challenge to constructive service of process focuses on whether there was competent substantial evidence to support the

decision of the trial judge. *Giron v. Ugly Mortg., Inc.* 935 So. 2d 580, 582 (Fla. 3d DCA 2006).

“The trial court's decision regarding the admission of testimony is reviewed for abuse of discretion.” *Dorsey v. Reddy*, 931 So. 2d 259, 266 (Fla. 5th DCA 2006) (citing *Shultheis v. Gotlin*, 919 So. 2d 546, 549 (Fla. 5th DCA 2005)). “The court's ruling on an evidentiary matter will be affirmed even if the court ruled for the wrong reasons, as long as the evidence or an alternative theory supports the ruling.” *Dorsey*, 931 So. 2d at 266 (citing *Muhammad v. State*, 782 So. 2d 343, 359 (Fla. 2001) Accordingly, the sufficiency of the Affidavits filed in support of constructive service are subject to a *de novo* standard of review while the competent substantial evidence standard is used to analyze whether the attempts made by the process server were adequate.

Appellant must be able to demonstrate the invalidity of the service of process by clear and convincing evidence before the motion to quash could be granted. Service which is regular on its face is presumed valid unless clear and convincing evidence is presented to the contrary. Furthermore, a defendant cannot impeach a summons by simply denying service, but must present

'clear and convincing evidence' to corroborate his denial of service." (quoting *Lazo v. Bill Swad Leasing Co.*, 548 So. 2d 1194, 1195 (Fla. 4th DCA 1989)); *Morales L. Grp., P.A. v. Rodman*, 305 So. 3d 759, 761 (Fla. 3d DCA 2020); *Allstate Mortg. Sols. Transfer, Inc. v. Nationstar Mortg., LLC*, 366 So. 3d 1129, 1130 (Fla. 3d DCA 2023)

b. Constructive Service Met The Statutory Requirements
And Was Valid, and Appellant fatally refers to different
party affidavit in its briefing

This Court should affirm not only because the Affidavit of Diligent Search and Proof of Publication was facially sufficient, but also because the search itself was legally sufficient to comply with the requirements for a "diligent search" to attempt to locate the Appellant. Appellee attempted service at every single possible address that was reported from the various searches conducted, and then followed all leads to their logical ends. It is clear that this case is nothing more than an attempt by the Appellant to delay a foreclosure by repeatedly avoiding service with the aid of various entities.

Appellant on or about August 17, 2023, filed an unverified Motion to Quash Service regarding service by publication. (App. pg.

412-414). The unverified motion does not attach any evidence to overturn the facially valid proof of publication or the affidavits indicating constructive service and diligent search.

When a plaintiff cannot obtain personal service over a defendant, constructive service is available for cases specified in section 49.011, Florida Statutes, including cases seeking to enforce any legal or equitable right to real property, such as the mortgage foreclosure case at hand. § 49.011(1), Fla. Stat. When constructive service is disputed, it is the trial court's duty to determine whether the legally sufficient sworn statements required by Florida statute were filed, and then whether the plaintiff conducted an adequate search to locate the defendants. *First Home View Corp. v. Guggino*, 10 So. 3d 164, 165 (Fla. 3d DCA 2009). As will be explained below, Appellee met both these prongs, and affirmance is the proper result on appeal.

Appellant's argument that the Diligent Search Affidavit is facially invalid is not supported by Florida law. The Diligent Search Affidavit contained the three statements required by statute and did not contain hearsay. Furthermore, because there is no requirement

that a court resort to extrinsic evidence to determine facial sufficiency this Court should affirm.

The address listed on the summons for Appellant was 4604 49th Street N167, St. Petersburg, Florida. (App. pg. 201, 204). Returns of non-service were issued regarding attempted addresses 4604 49th Street N167, St. Petersburg, Florida and 6210 44th Street N18, St. Petersburg, Florida. (App. pg. 248-249)

On or about March 20, 2023 Appellee filed in the lower trial Court an affidavit regarding its attempt at service at multiple addresses for Appellant, diligent search and inquiry as to locate Appellant. (App. pg. 292-295).

Appellant in their Initial Brief on page 8 indicate that at least one attempt must be made at the address listed on the summons, and the record in the Appellant's index clearly reflects this attempt as shown in the returns of non-service and the constructive service affidavit that incorporates the process servicer's affidavit regarding diligent search and inquiry. Appellant refers to App. pg. 283-287 as proof that service was not attempted throughout their brief, but the references on App. pg. 283-287 refer to another party, Unknown Trustee of Orlando Holdings 22 Trust that counsel for Appellant

represents not this Appellant. This error by Appellant is fatal, as App. pg. 292-295 clearly reflects the attempt on the summons address for Appellant on the registered agent Fleet Financial, along with an attempt at a secondary address before publication.

An affidavit that contains these three statements is facially sufficient, even if the statements are made in a conclusory manner. *Se. & Assocs., Inc. v. Fox Run Homeowners Ass'n, Inc.*, 704 So. 2d 694, 696 (Fla. 4th DCA 1997) (citing *Demars v. Vill. of Sandalwood Lakes Homeowners Ass'n, Inc.*, 625 So. 2d 1219, 1223 (Fla. 4th DCA 1993)).

On or about March 20, 2023 Appellee filed in the lower trial Court an affidavit regarding its diligent search and inquiry as to Appellant. (App. pg. 292-295). An Affidavit of Publication was filed on or about May 8, 2023, regarding publication of the Notice of Action to Appellant. (App. pg. 333).

The Appellant confuses the concept of facial sufficiency when he argues that there was insufficient evidence to prove the facial sufficiency of the affidavit. But, by definition, a trial court can determine the facial sufficiency of an affidavit without resorting to extrinsic evidence. *Jacobs v. State*, 880 So. 2d 548, 551 (Fla. 2004)

(stating that a determination of facial sufficiency under Florida Rule of Criminal Procedure 3.850 is one of law that involves an evaluation of the legal sufficiency of the claim alleged, the evidence in the record will ordinarily be irrelevant to such an evaluation); *Romeo v. U.S. Bank Nat'l Ass'n*, 144 So. 3d 585, 587 (Fla. 4th DCA 2014) (giving an example of facially insufficient affidavits of service because the affidavits stated that the process server received the alias summonses two days before they were actually issued).

The affidavit in this case contains all of the required statements, and is therefore facially sufficient. *Id.* Thus, this Court should come to the inescapable conclusion that the Diligent Search Affidavit was facially sufficient.

CONCLUSION²

Based on the foregoing, Appellee, respectfully requests that the order of the Trial Court, which is the subject of this appeal, be affirmed, either upon the finding of lack of jurisdiction to review and/or if necessary on merits as Appellant fatally confuses the

² Although a Notice of Appeal related to the order denying a motion to quash for WATERVIEW COMMUNITY HOMEOWNERS ASSOCIATION 2 was filed; this issue was not briefed and therefore believed either in error or abandoned

returns of service for Appellant with other defendants, therein conceding their argument on appeal since there is sufficient proof of an attempt of service at the summons address.

CERTIFICATE OF COMPLIANCE

I, the undersigned Counsel for Appellee, hereby certify that this pleading complies with the font requirements set forth in Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Electronic Mail pursuant to Fla. R. Gen. Prac. & Jud. Admin. 2.516 and /or by U.S. Mail to any other parties in accordance with the service list below on this 26th of August 2024.

/s/ Shawn Taylor, Esq.

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**DESIGNATED PRIMARY E-MAIL FOR
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PRAC. & JUD. ADMIN. 2.516**

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