

IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO.: SC19-1970
DCA CASE NO.: 4D19-1079

Denise M. Lopez,

Petitioner,

vs.

American Express National Bank
f/k/a American Express Centurion Bank,

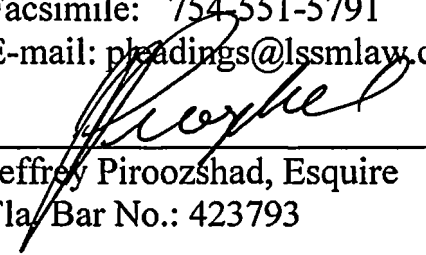
Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF

On Appeal from the Fourth District Court of Appeal in the State of Florida.

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PREFACE AND PRELIMINARY STATEMENT

This is an appeal of an Order Denying Defendant's Motion to Dismiss and to Quash Service by the trial court, which shall be referred to as the "Lower Tribunal" The Respondent is the Plaintiff in the Lower Tribunal, who shall be referred to as "Respondent," and the Defendant is the named Petitioner, who shall be referred to as "Petitioner." The record on appeal will be designated as "R." with the corresponding page number.

STATEMENT OF THE CASE AND FACTS

Respondent was the Plaintiff in the Circuit Action styled *American Express National Bank f/k/a American Express Centurion Bank v. Denise M. Lopez a/k/a Denise Lopez*, Case No. 2018CA013157XXXXMB, which was filed on October 17, 2018.

The lawsuit originated with the filing of a three-count complaint on a defaulted credit card account filed by Respondent against Petitioner. The Complaint set forth causes of action based on money lent, account stated and unjust enrichment.

On November 12, 2018, Petitioner was properly served via substitute service. Substitute service was accomplished by serving a copy of the summons and complaint on Petitioner's co-resident, Mr. Clyde Barrows. On November 15, 2018, Petitioner filed a Motion to Dismiss alleging that service was not properly effectuated. On December 20, 2018, the Lower Tribunal entered an order denying Petitioner's motion without prejudice and giving Petitioner thirty days to file an amended motion challenging service and requesting an evidentiary hearing. On January 18, 2019, Petitioner filed a second Motion to Dismiss. The second Motion to Dismiss once again challenged the sufficiency of service of process and requested a hearing.

On March 25, 2019, Petitioner filed an Emergency Amended Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction. Petitioner asserted

that the Lower Tribal did not have subject matter jurisdiction based on the fact that the cardmember agreement pertaining to Petitioner's account is governed by Utah law. Additionally, on March 25, 2019, the Lower Tribunal entered an order denying the Emergency Amended Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction as the Court found that the motion did not constitute an emergency. The order further stated that the Lower Tribunal would consider the merits of the motion at the April 1, 2019 Motion to Dismiss and Motion to Quash hearing.

On April 1, 2019, the Lower Tribunal conducted an evidentiary hearing on Petitioner's Motion to Dismiss and Quash Service.

The Court considered evidence and heard testimony regarding the sufficiency of service from the process server, Grant Clark, Petitioner, and Clyde Barrows. The Lower Tribunal carefully weighed the evidence and correctly determined that Petitioner was properly served via substitute service. Additionally, on April 1, 2019, the Lower Tribunal entered an order denying Petitioner's Motion to Dismiss and Quash Service. The instant appealed followed.

SUMMARY OF ARGUMENT

The primary areas of inquiry at issue in this appeal are whether the Lower Tribunal properly denied Petitioner's Motion to Dismiss and Motion to Quash. Additionally, this Court must determine whether the Lower Tribunal had personal jurisdiction over Petitioner. Finally, a determination must be made as to whether the Lower Tribunal had subject matter jurisdiction in this matter.

The Lower Tribunal properly denied Petitioner's Motion to Dismiss and Motion to Quash. The Lower Tribunal correctly applied Florida law in the instant action as service of process is a procedural matter, not a substantive matter. Lastly, the Lower Tribunal properly exercised personal jurisdiction over Petitioner.

STANDARD OF REVIEW

It is an elementary principle of appellate review that an appellate court must presume that a trial court's decision is correct unless the Petitioner provides the appellate court with a record that is sufficient to evaluate the Petitioner's contentions of error. *Harrison v. Harrison*, 909 So.2d 318, 319 (Fla. 2d DCA 2004) (referencing *Kirchinger v. Kirchinger*, 546 So.2d 86 (Fla. 2d DCA 1989); *Beasley v. Beasley*, 463 So.2d 1248 (Fla. 5th DCA 1985)).

The appellate review of the matter herein is *de novo* as the review of an order denying a Motion to Quash service is *de novo*. See *Bank of Am., NA., v. Bornstein*, 39 So. 3d 500, 502 (Fla. 4th DCA 2010).

LEGAL ARGUMENT

- I. THE LOWER TRIBUNAL CORRECTLY DENIED PETITIONER'S MOTION TO DISMISS AND QUASH SERVICE AFTER CONDUCTING AN EVIDENTARY HEARING ON THE MATTER. THE LOWER TRIBUNAL PROPERLY EXERCISED PERSONAL JURISDICTION OVER PETITIONER.

The Lower Tribunal properly denied Petitioner's Motion to Dismiss and Motion to Quash. Under Florida law, it is beyond question that a process server who leaves papers with someone other than the person to be served must ensure that the individual, with whom the service is left, is (a) fifteen (15) years of age or older, (b) a resident of the home, and (c) informed of the contents of documents then served. *See* §48.031(1)(a), Fla. Stat. (2013).

In the instant appeal, the Amended Verified Return of Service contains "all of the information in compliance with the specific requirements of Section 48.031(1)(a)." *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177, 179. (Fla. 3d DCA 2011). Therefore, Respondent is entitled to a presumption of valid service of process, unless and until Petitioner proffers clear and convincing evidence to the contrary. *Id.* Clear and convincing evidence has been defined as "evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." Fla. Std. Jury Inst. (Civ.) 405.4 (adopting the definition set forth in *Slomovitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

During the April 1, 2019 evidentiary hearing the Lower Tribunal carefully reviewed the evidence presented by both parties, as well as the testimony of the process server, Grant Clark, Petitioner and Clyde Barrow. The Lower Tribunal correctly concluded that Petitioner was properly served. Further, the Lower Tribunal found that the Petitioner failed to provide sufficient clear and convincing evidence to rebut the presumption of validity of service. Therefore, the sound ruling of the Lower Tribunal must remain undisturbed.

Finally, the Lower Tribunal correctly exercised personal jurisdiction over Petitioner as she was properly served. Petitioner's lack of personal jurisdiction assertion is entirely baseless and completely devoid of merit. Additionally, Respondent requests this Honorable Court disregard Petitioner's argument regarding substitute service on Petitioner via mail. Respondent did not attempt to serve process upon Petitioner by mail. Further, Petitioner has not produced any evidence to support her erroneous contention that Respondent unsuccessfully attempted to serve Petitioner via mail.

II. THE LOWER TRIBUNAL CORRECTLY APPLIED FLORIDA LAW IN THE INSTANT ACTION AS SERVICE OF PROCESS IS A PROCEDURAL MATTER. THEREFORE, THE LOWER TRIBUNAL PROPERLY EXERCISED SUBJECT MATTER JURISDICTION.

The Lower Tribunal properly applied Florida law in the instant action as service of process is a procedural matter. In a choice of law context, Florida

maintains the traditional distinction between substantive and procedural matters. *See BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So. 2d. 366, 371 (Fla. 4th DCA 2001). Substantive law generally relates to the rights and duties of a cause of action, while procedural law involves the “machinery for carrying on the suit.” *Id.* at 371.

Undersigned Counsel is unable to locate a Florida case deciding whether service of process is a substantive or procedural matter. However, Florida courts have determined that the ability to bring an action is substantive and the machinery for carrying out the suit is procedural. *Id.*

The Eleventh Circuit has held that “[u]nder Florida’s choice of law provisions, Florida law governs all substantive issues, including whether an individual has standing to sue.” *Gonzalez-Jiminez De Ruiz v. U.S.*, 378 F.3d 1229, 1230 (11th Cir. 2004). Additionally, the Florida Supreme Court held that “statute of limitations should be treated as substantive. *See Merkle v. Robinson*, 737 So. 2d 540, 542 (Fla. 1999). The issues of standing and statute of limitations are substantive as they relate to the ability of a party to bring an action.

In contrast, the issue at bar here does not involve Respondent’s ability to bring an action. In fact, Petitioner’s brief does not assert that Respondent is precluded from moving forward in the instant matter. Service of process is entirely procedural in nature as it does not impact a party’s ability to maintain an action. Lack of

standing and filing suit outside of the applicable statute prohibit a party from moving forward with litigation. Service rules simply set forth the requisite procedures to properly effectuate service. These rules provide the procedural machinery necessary to allow the litigants an opportunity to carry on with a suit. Therefore, the Lower Tribunal's application of Florida law at the April 1, 2019 evidentiary hearing was correct and must remain undisturbed. Also, it would be against public policy (and highly impractical) to require every process server in Florida to know the rules and laws for service for all fifty states in addition to being able to figure out what state's rules and laws regarding service of process should be used in the first place.

Additionally, Petitioner makes a fruitless attempt to argue that the Lower Tribunal does not have subject matter jurisdiction as the contract between the parties provides that Utah and Federal law govern the agreement. The subject provision does not contain any language indicating Respondent is prohibited from filing suit in Florida. The contractual terms simply indicate that "Utah law and federal law govern this Agreement and your account." If Utah and Federal law govern, that only means that the Court will apply those laws in determining the outcome of the case. It has nothing to do with deciding in what venue the case should be brought. Defendant is a resident of Florida and therefore, this case was properly brought in Florida.

Finally, Petitioner erroneously argues that the Lower Tribunal does not have subject matter jurisdiction as the matter belongs in the arbitration system. The applicable cardmember agreement states in pertinent part as follows: [a]ny claim shall be resolved, upon the election by you or us, pursuant to this arbitration provision.” Neither party has elected arbitration in this matter. Petitioner did not bring a Motion to Compel Arbitration in the trial court, nor did she ever raise it in any of the motions she did file. Further, the arbitration provision does not contain any language precluding Respondent from filing suit in state court. Therefore, Respondent requests this Court disregard Petitioner’s unsupported agreement and affirm the Lower Tribunal’s ruling that subject matter jurisdiction is proper.

III. PETITIONER FAILED TO ESTABLISH ERROR BY THE LOWER TRIBUNAL BY NOT PROVIDING A TRANSCRIPT OF THE APRIL 1, 2019 EVIDENTIARY HEARING.

It is well established that a Petitioner has the burden of demonstrating error by the trial court. Petitioner has failed to meet that burden by not providing a transcript of the April 1, 2019, evidentiary hearing pertaining to the sufficiency of service of process. *See Arthur v. Gibson*, 654 So. 2d 983 (Fla. 5th DCA 1995). *See also Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) holding that when a party asks an appellate court to resolve issues of facts or draw conclusions from the evidence, the appellate court must have a proper record to conclude that the trial court’s decision is not supported by the evidence. Here, in the

absence of a record of the evidentiary hearing pertaining to service, this Court must presume that the lower tribunal's ruling denying Petitioner's Motion to Dismiss and Quash Service is correct.

CONCLUSION


In conclusion, the decision denying Petitioner's Motion to Dismiss and Motion to Quash rendered by the Lower Tribunal was based on a thorough examination and consideration of the facts and evidence. The Lower Tribunal gave ample and careful consideration to the evidence and testimony presented by both parties at the April 1, 2019 evidentiary hearing. The Lower Tribunal correctly determined that Petitioner was properly served.

Additionally, the Lower Tribunal properly determined that the Court had personal jurisdiction over the Petitioner as well as subject matter jurisdiction to hear the instant action. Therefore, the sound, well-reasoned decision of the lower tribunal must stand.

RESPECTFULLY SUBMITTED this _____ day of January, 2020 .

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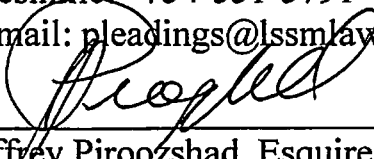
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed this _____ day of January, 2020 with the Clerk of Court via the Clerk's E-filing Portal and a copy emailed to:

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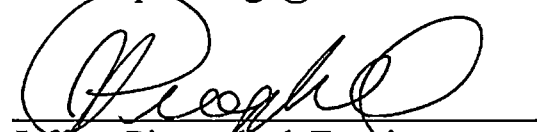

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font in the foregoing Respondent's Answer is Times New Roman 14 point and is in compliance with the Florida Rules of Appellate procedure.

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