IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT
CASE NO. 3D23-1612
L.T.: 22-18863-CA-01

BLUE AGAVE IMPORTS, LLC,

Appellant,

vs.

JONATHAN ALEXIS WEINBERG PINTO,

Appellee.

ANSWER BRIEF OF JONATHAN ALEXIS WEINBERG PINTO

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The lower court was correct in granting the Motion to Quash Service of Process and Vacate Judicial Default based on the following:

(i) The Appellee, Jonathan Alexis Weinberg Pinto ("Weinberg Pinto") made a *prima facie* showing that substitute service on Adriana Perez was invalid;

(ii) Weinberg Pinto further proved by clear and convincing evidence that he and Adriana Perez did not reside at 5500 Island Estates Drive, Apt. 1004, Aventura, Florida 33160 and as such, substitute service at that specific address was invalid; and

(iii) The invalid service of process rendered the Judicial Default entered against Weinberg Pinto as void obviating the need for Weinberg Pinto to have to establish excusable neglect, meritorious defenses, and due diligence in seeking to set aside the Default.

IV. ARGUMENT

Strict Construction of Florida Statute §48.031 is required

"Statutes governing service of process are to be strictly construed and enforced." *Carus v. Cove at Isles at Bayshore Homeowners Association, Inc.*, 354 So.3d 1111 (Fla. 3rd DCA 2022); *Herskowitz v. Schwarz & Schiffrin*, 411 So.2d 1359 (Fla. 3rd DCA 1982) (statutes

governing substituted service of process must be strictly complied with and strictly construed); *BoatFloat, LLC v. Central Transport International, Inc.*, 941 So.2d 1271, 1273 (Fla. 4th DCA 2006) ("Strict compliance with service of process procedures is required.")

"Indeed, because statutes authorizing substituted service are exceptions to the general rule requiring a defendant to be served personally, due process requires strict compliance with their statutory requirements." *Torres v. Arnco Constr., Inc.*, 867 So.2d 583, 586 (Fla. 5th DCA 2004).

Florida Statute §48.031(1)(a) provides in pertinent part:

> Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at **his or her place of abode with any person residing therein** who is 15 years of age or older and informing the person of their contents.

(emphasis supplied).

The Return of Service on Weinberg Pinto states:

> Received by Jaime Salinas on the 20th day of October, 2022 at 10:43 am to be served on Jonathan Alexis Weinberg Pinto, 1524 ISLAND BLVD., UNIT 13, AVENTURA, FL 33160 ….
>
> SUBSTITUTE served by delivering a true copy of the Summons and Complaint for Damages and Other Relief, and Exhibits with the date and hour of service endorsed thereon by me, to: **ADRIANA PEREZ** as **MOTHER** at the address of: **5500 Island**

> **Estates Dr., APT 1004, AVENTURA, FL 33160**, the within named person's usual **place of Abode**, who resides therein, who is fifteen (15) years of age or older and informed said person of the contents therein, in compliance with state statutes.
>
> Additional Information pertaining to this Service:
> 10/20/2022 3:07 pm NON SERVED:
> The house is empty. No neighbors available. Very private and secluded community. No one living at the house.
> 10/26/2022 12:03 pm NON SERVED – SECOND ADDRESS 2851 NE 183RD STREET, SUITE 1408 E, AVENTURA, FL 33160: As per Harriet Diegle, office manager of the building. There's no owner or tenant in unit 1408E that goes by the name Jonathan Alexis Weinberg Pinto. No further information provided.
>
> Description of Person Served: Age: 50, Sex: F, Race/Skin Color: Hispanic, Height: 5'3", Weight: 135, Hair: Dark Brown, Glasses: N"
>
> (App. 41-43).

The Plaintiff has the burden to prove that service of process is valid when a defendant files a Motion to Quash Service. See *Kemmerer v. Klass Associates, Inc.,* 108 So.3d 672, 674 (Fla. 3rd DCA 2013). In the present case, once Weinberg Pinto filed a Motion to Quash Service of Process and Vacate Judicial Default ("Motion to Quash"), the Appellant, Blue Agave Imports, LLC. ("Appellant"), had the burden to establish the validity of service as the party invoking the court's jurisdiction. See id. Appellant relied on a Return of Service that appears to be regular on its face and thus

presumed valid.[1] Assuming *arguendo* that Appellant met this burden, Weinberg Pinto must now make a *prima facie* showing by clear and convincing evidence that the service was, in fact, invalid. Weinberg Pinto submitted two (2) affidavits in which he and Adriana Perez, the person who received the substitute service of process, asserted that Weinberg Pinto was not residing at the 5500 Island Estates Drive, Apt. 1004, Aventura, Florida 33160 address where the documents were served ("5500 Island Estates address"). Ms. Perez' affidavit further asserted that she personally did not reside at the 5500 Island Estates address.

Ms. Perez's affidavit attested in relevant part as follows:

> I am employed as a housekeeper by Sylvia Donna Pinto Mazal at 5500 Island Estates Drive, Apt. 1004, Aventura, Florida 33160. I work there Monday through Friday from 9:30 am until about 5:30 pm. **I do not reside there.**

[1] However, because **Appellant's Initial Brief admits that Adriana Perez is not Weinberg Pinto's mother** (a factual misrepresentation on the face of the Return of Service since it erroneously identifies Adriana Perez as the mother), the Return of Service should not be entitled to a presumption of facial validity. See *Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So.2d 467, 472 (Fla. 5th DCA 2007) (holding that "the trial court was not permitted to presume that the service of process was valid" under section 48.21 where "the return of service was defective on its face because it actually stated that it came to hand before summonses were even issued"); See also *Preudhomme v. Matthews*, 194 So.3d 1057 (Fla. 4th DCA 2016) (Plaintiff seeking to invoke court's jurisdiction bears the burden of proving proper service, which requires a showing that the return of service is facially valid or regular on its face).

> Jonathan Alexis Weinberg Pinto **does not reside at 5500 Island Estates Drive, Apt. 1004, Aventura, Florida 33160** and has never resided there.
>
> On January 25, 2023, a man came to the door asking for Jonathan Alexis Weinberg Pinto. **I informed him that Jonathan Alexis Weinberg Pinto did not reside here**.

(App. 60).

By submitting these affidavits, Weinberg Pinto rebutted the Return of Service and showed that substitute service was not made at his usual place of abode and that Ms. Perez did not reside where the documents were served. As a result, Weinberg Pinto met his burden of proving that service was invalid. See *Gonzalez v. Totalbank*, 472 So.2d 861, 864 n.1 (Fla. 3rd DCA 1985) (" . . . when . . . the challenging party makes a prima facie showing that the return is defective, then the burden shifts to the person acting under the substituted service provision to prove valid service.") (citation omitted); See also *Romeo v. U.S. Bank National Association*, 144 So.3d 585, 587-588 (Fla. 4th DCA 2014),

> . . . [T]he process server attested that he effected substituted service upon Frank through his unknown spouse, 'Lena Romeo,' and personally served her as well. **However, Frank's motion and the multiple affidavits filed in support thereof demonstrate that Lena is Frank's mother, not his wife, and that she was not living at the residence when the service allegedly occurred**. Frank's 'motion and affidavit are based on the fact

> that the service did not comply with section 48.031 and was therefore legally deficient, making the affidavits of service defective on their face. See *Thompson v. Dep't of Revenue*, 867 So.2d 603, 605 (Fla. 1st DCA 2004) (finding the return of service to be 'legally deficient' for not complying with section 48.031 based on the respondent's '*prima facie'* showing that he was not served at his usual place of abode by valid substitute service because his sworn affidavit asserted that he was separated from his wife, had not lived at the residence for over three years, and did not authorize anyone there to accept service on his behalf).

See also *Boatfloat, LLC*, 941 So.2d at 1274 ("[I]t is clear that service of process on [the defendant] did not meet the requirements of section 48.031 because the papers were not given to [the defendant] himself or anyone fifteen years or older who resided with [the defendant]"); *Schupak v. Sutton Hill Assocs.*, 710 So.2d 707, 709 (Fla. 4th DCA 1998) (finding service insufficient where "there was no evidence to show appellant or anyone eligible to accept service on his behalf was present inside the apartment at the time the process server was there, nor to show that appellant attempted to frustrate service of process in any manner beyond residing in a doorman-staffed apartment"). See also *Weiss v. Mashantucket Pequot Gaming Enterprise*, 935 So.2d 69 (Fla. 3rd DCA 2006) (Service of process on defendant's wife at defendant's former residence, while he was incarcerated, was ineffective, and thus trial court did not gain jurisdiction

over the defendant in action to domesticate foreign judgment, under statute requiring that substitute service must be made at the place a person actually lives at the time of service).

Weinberg Pinto's showing that service was invalid shifted the burden back to Appellant to prove that there was a proper basis for the court to exercise personal jurisdiction over Weinberg Pinto; that is, to prove that the substitute service was valid. See *Kemmerer,* 108 So.3d at 674. This burden required further evidence from the Appellant "such as an affidavit or testimony" establishing Weinberg Pinto's usual place of abode or that Ms. Perez resided at the 5500 Island Estates address with Weinberg Pinto. See id.

In this case, Appellant did not file any additional sworn proof or offer testimony at the hearing in opposition to Weinberg Pinto's Motion to Quash. The trial court memorialized as much in its' Order by finding that "[T]he [Appellant] failed to rebut the claims in the Motion to Quash that Service was improper. The [Appellant] did not produce the Process Server or Private Investigator to rebut said claims." (App. 198-199). Appellant's failure to offer such additional sworn facts required the trial court to correctly quash service of process and vacate the judicial default. See *Portfolio Recovery Associates, LLC v. Gonzalez*, 951 So.2d 1037, 1038

(Fla. 3d DCA 2007); *Baker vs. Stearns Bank, N.A.*, 84 So.3d 1122, 1127 (Fla. 2d DCA 2012); *Haueter-Herranz v. Romero*, 975 So.2d 511, 518 (Fla. 2d DCA 2008); *Bennett v. Christiana Bank & Trust Company*, 50 So.3d 43, 46 (Fla. 3d DCA 2010) (the Court found that Plaintiff "Christiana Bank, its trial court attorneys, and Christopher P. Mas of the process serving entity Pro-Vest LLC offered no testimony or other competent evidence to address the deficiency in service identified by Ms. Bennett's counsel."); *Carus,* 354 So.3d at 1115 (the Court concluded that the Plaintiff failed to provide competent, substantial evidence of valid service because, amongst other reasons, the process server who allegedly served [Defendant] Carus was unavailable to testify at the hearing and "[t]he ultimate burden of proving valid service of process always remains upon plaintiff") citing *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So.3d 177, 181 n.9 (Fla. 3d DCA 2011).

Besides failing to rebut Weinberg Pinto's evidence, the record also shows that facts alleged in Appellant's Return of Service were debunked by the court and the Appellant themselves thereby further undermining the facial validity of the Return of Service and making it legally deficient. This was demonstrated at the hearing where the trial court judge had the following exchange with Appellant's counsel:

THE COURT: I just – let me ask you this, Mr. Ehrenstein, so we save some time.

Are you saying that Adriana [Perez] is the mother of the Defendant? Is that what you're saying?

MR. EHRENSTEIN: No, Your Honor.

(App. 176, lines 22 -24).

Appellant's counsel also debunked its' own Return of Service by admitting that Adriana Perez is not Weinberg Pinto's mother. Specifically, in its' Initial Brief, Appellant states: "[T]he Weinberg Defendants include **Weinberg Pinto's mother, Sylvia Donna Pinto De Weinberg**, also referred to as Sylvia Donna Pinto Mazal."). (emphasis supplied). See Appellant's Initial Brief, page 4. This admission further proves the unreliability of the Return of Service and insufficiency of service. See *Bennett*, 50 So.3d at 45 ("The process server's own notes, an admission against the interest of his principal, *see* § 90.803(18)(d), Fla. Stat. (2009), prove the insufficiency of service.").

Furthermore, the source used by the Appellant's investigator to locate Weinberg Pinto completely contradicts said investigator. The Appellant's investigator, Crossroads Investigations, stated in a report that Monica Sarmiento, a licensed real estate professional and property manager, confirmed that Weinberg Pinto was living at the 5500 Island Estates

address. (App. 66, ¶¶15-16; 141). However, in a signed Affidavit obtained by undersigned counsel, Ms. Sarmiento states in pertinent part:

> In or around January 2023, I was contacted by someone who identified themselves as an attorney trying to locate Mr. Weinberg Pinto in order to serve him with court documents in this matter.
>
> Prior to that date and since that date, no one has ever contacted me trying to locate Mr. Weinberg Pinto.
>
> I informed that person that I did not know where Mr. Weinberg Pinto was residing.
>
> I certainly did not inform that person that Mr. Weinberg Pinto was residing at 5500 Island Estates Dr., Apt. 1004, Aventura, Florida 33160-5298 as that is not true.
>
> I know that Mr. Weinberg Pinto does not reside at 5500 Island Estates Dr., Apt. 1004, Aventura, Florida 33160-5298 because that is where his parents, Mauricio Samuel Weinberg Lopez and Sylvia Donna Pinto, reside whom I also personally know having assisted them in other real estate matters.

(App. To Answer Brief, 5-6, ¶¶6-10).

Weinberg Pinto submitted clear, uncontroverted and credible affidavits which the trial court judge relied on in finding that the service of process was invalid. See *Preudhomme v. Matthews*, 194 So.3d 1057 (Fla. 4th DCA 2016) ("'Clear and convincing evidence' necessary to impeach a

return of service requires that the witnesses to a fact be credible; the facts testified to must be distinctly remembered; the details must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts in issue").

Judicial Default was void

Florida Rule of Civil Procedure 1.540(b) states in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> …
>
> (4) that the judgment, decree, or order is void …"

It is not necessary to satisfy all of the reasons enumerated in Rule 1.540(b) in order to set aside a Judicial Default. "Florida Rule of Civil Procedure 1.540(b)(4) permits motions for relief from void judgments or court orders to be filed at any time." See *Weiss,* 935 So.2d at 70. Therefore, Weinberg Pinto did not have to be swift or establish excusable neglect, a meritorious defense and due diligence in order to set aside a void Default based on invalid or defective service of process. Establishing that the Judicial Default is void is sufficient to set it aside.

The trial court judge correctly concluded that service of process on Weinberg Pinto was invalid and as such the Judicial Default was void. Denying someone due process voids any default obtained for lack of a response. See *Viets v. Am. Recruiters Enterprises, Inc.,* 922 So.2d 1090, 1096 (Fla. 4th DCA 2006). Further, it is not necessary for Weinberg Pinto to also establish excusable neglect, a meritorious defense and due diligence when the default is void. See *Mullne v. Sea-Tech Constr., Inc.,* 84 So.3d 1247, 1249 (Fla. 4th DCA 2012) (a party is not required to establish excusable neglect or a meritorious defense when the judgment is void).

V. CONCLUSION

The trial court did not abuse its' discretion in concluding that:

(i) substitute service of process on Weinberg Pinto was invalid; and

(ii) setting aside the Judicial Default.

Accordingly, the trial court's order quashing service of process and vacating the Judicial Default should be affirmed.

Respectfully Submitted,

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By: *s/Giorgio L. Ramirez, Esq.*
FL Bar No. 195545

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all registered parties via the Florida Courts E-filing portal on this 14th day of December, 2023.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is prepared in Arial 14-point font, in compliance with Fla. R. App. P. 9.045(b), and does not exceed 13,000 words in compliance with Fla. R. Civ. P. 9.210(a)(2)(B).

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