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

BLUE AGAVE IMPORTS, LLC,

Appellant,
v.

JONATHAN ALEXIS WEINBERG PINTO,

Appellee.
_____/

BLUE AGAVE IMPORTS LLC'S INITIAL BRIEF

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III. STATEMENT OF THE CASE

A. The Order on Appeal

Appellant, BLUE AGAVE IMPORTS, LLC ("Blue Agave"), a Florida limited liability company, appeals from the trial court's August 9, 2023 Order Granting the Defendant's Motion to Quash Service of Process and Vacate Judicial Default which made the following findings:

1. The Service of Process on the Defendant was invalid.
2. The Plaintiff, BLUE AGAVE IMPORTS, LLC. ("Plaintiff") failed to rebut the claims in the Motion to Quash that Service was improper. The Plaintiff did not produce the Process Server or Private Investigator to rebut said claims.
3. There is no showing that the Defendant delayed in objecting to the defective Service of Process. The Defendant certainly was not in swift in objecting but he did not wait nine (9) months to do so as referenced in the case of Schneiderman v. Cantor, 546 So.2d 51, (Fla. 4th

DCA 1989), cited by the Plaintiff in their Response to the Motion to Quash.

(App.198).

B. Nature of the Case

Blue Agave brought its lawsuit against Appellee, JONATHAN ALEXIS WEINBERG PINTO ("Weinberg Pinto"),[1] for damages and other relief after Weinberg Pinto fraudulently induced Blue Agave to enter into an agreement to act as the exclusive brand representative for a Mexican tequila supplier. Weinberg Pinto used deceit, subterfuge, and intentional concealment of his ongoing participation in money laundering, organized crime, and other illegal activity to induce Blue Agave to perform contractual obligations to its detriment.

C. Factual Background

1. This appeal arises in the context of the Appellee's active evasion of service of process, not just in the foregoing civil tort case, but also in connection with a felony criminal arrest warrant and

[1] The filings in the lower tribunal variously refer to the defendant-appellee as Pinto or Weinberg. To mitigate confusion, he is referred to as "Weinberg Pinto" herein.

evasion of extradition. (App.62-66). In this case and in others, Weinberg Pinto is alleged to be involved in criminal activity related to the Sinaloa Mexican drug cartel. (App.62-66).

2. Accordingly, to fully appreciate the context in which Pinto's Motion arose, Blue Agave requested the lower court should take judicial notice of the entire court file in Case No. 2021-021562-CA-01 (the "Money Laundering Case"), pending in the Complex Business Litigation Division of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. (App.62-66).

3. The Money Laundering Case is cited in Blue Agave's Complaint (Compl. ¶ 11) (App. 6). The court presiding over the Money Laundering Case has personal jurisdiction over Weinberg Pinto; he is represented by counsel in the Money Laundering Case, and his counsel in the Money Laundering Case was served with the notice of the judicial default entered in this case. (App. 68-69).

4. Weinberg Pinto's filings in the Money Laundering Case shed light on his reasons for evading service, providing a motive for dishonesty regarding his abode. (App.62-66).

D. Criminal Charges Are Pending in Mexico With Further Charges Expected in the United States.

5. The Mexican government has since filed a criminal action against Defendant Weinberg Pinto in Mexico. Weinberg Pinto has avoided going back to Mexico to answer the criminal charges. See July 10, 2023, "Motion to Abate" filing from Defendant Weinberg Pinto (and others)[2], in the Money Laundering Case. (App.65).

6. Weinberg Pinto's Money Laundering Case counsel advises,

> There is unfortunately no doubt about "the risk of prosecution" in this case. **The criminal case has already been brought by the Mexican government ...in Mexico**. The criminal allegations...[are that] **the Weinberg Defendants engaged in a "government contracting scheme" in Mexico to obtain contracts from Mexican government agencies and then "laundered" the proceeds of those contracts by transferring the funds into the United States**[.]

(App. 64).

7. On July 27, 2023, in support of Weinberg Pinto's motion seeking abatement due to fear of self-incrimination resulting from simultaneously pending criminal proceedings, Weinberg Pinto's

[2] Weinberg Pinto is one in a group of defending parties referred to as the "Weinberg Defendants" in the Money Laundering Case. The Weinberg Defendants include Weinberg Pinto's mother, Sylvia Donna Pinto De Weinberg, also referred to as Sylvia Donna Pinto Mazal.

Money Laundering Case counsel makes clear that the Mexican government commenced prosecution of the "Weinberg Defendants" through an indictment and arrest warrant filed in February 2023, and that, "**The threat of American prosecution here is very real.**" Exhibit B, Reply in Support of Motion to Abate, Page 5. (App. 65).

E. Weinberg Pinto is Actively Evading an Arrest Warrant.

8. Weinberg Pinto's Money Laundering Case lawyer represents that the charges in Mexico come with "felony level punishment," and "the imposition of years in jail and severe fines and restitution payments as punishment." Exhibit A, Motion to Abate, p. 4. (App. 62-66).

9. As long as Weinberg Pinto remains hiding, the criminal case in Mexico is effectively stayed.

> In fact, the criminal proceedings against Mauricio Samuel Weinberg Lopez, **Jonathan Alexis Weinberg Pinto**, and **Sylvia Donna Pinto De Weinberg will not proceed further until their presence in Mexico before the criminal court is achieved**. … ("Díaz de Leon Aff."), ¶¶ 31-32. **While they remain outside Mexico and until they appear before the Mexican courts, the legal proceedings against them in Mexico are essentially stayed.** Díaz de Leon Aff. ¶¶ 38-39.

Affidavit of Mexican legal expert, José Díaz de Leon Cruz. (App. 65).

10. Díaz de Leon also confirmed that Weinberg Pinto represents a flight risk, advising "[t]hat the Mexican found that there was a special need for caution with regard to the Weinberg Defendants, which translated into **the presence of an elevated risk of flight**." (App. 65).

11. As a result of the Mexican criminal proceedings, and the fact that Weinberg Pinto has not returned to Mexico to answer the charges against him, the Court may infer Weinberg Pinto is highly incentivized to remain in hiding and misrepresent his whereabouts.

F. Blue Agave Served the Complaint Pursuant to the Results From a Licensed Private Investigator.

12. This being a case where the defendant is a foreign national and alleged to be a significant affiliate of the Sinaloa drug cartel, service of process was a difficult and involved process.

13. To effectuate service, Blue Agave retained the services of a private investigator. (App. 66).

14. After extensive research by its private investigator, Crossroads Investigations, Plaintiff served Weinberg Pinto at "5500 Island Estates Drive, Apt. 1004, Aventura, Florida 33160." See, Verified Return of Service. (App.41-43).

15. The investigation concluded that in January of 2023, "through discreet investigative means, Monica Sarmiento, licensed real estate professional and property manager, confirmed Jonathan Weinberg Pinto is a resident at 5500 Island Estates Dr Apt 1004, Aventura, FL 33160-5298." (App. 66).

IV. SUMMARY OF THE ARGUMENT

The lower court erred in granting the Motion to Quash Service of Process and Vacate Judicial Default ("Motion") by:

(i) failing to apply the proper burden which required Weinberg Pinto to proffer clear and convincing evidence to overcome the presumption in favor of valid service;

(ii) misreading the law requiring a defendant to act with swiftness to challenge a defect in service and set aside a default; and

(iii) abusing its discretion by granting a motion to vacate a default that was legally deficient as a matter of law and failed to meet *any* of the elements required for relief.

V. ARGUMENT

A. Standard of Review

The standard of review is mixed. A trial court's ruling on a motion to quash service of process, to the extent it involves questions of law, is subject to *de novo* review. Robles-Martinez v. Diaz, Reus & Targ, LLP, 88 So. 3d 177, 179 (Fla. 3d DCA 2011). By contrast, abuse of discretion guides review of orders setting aside default judgment. Importantly, a trial court abuses its discretion when, as here, "it sets aside a default judgment underlying which is a legally insufficient motion to vacate." Church of Christ Written In Heaven of Georgia, Inc. v. Church of Christ Written In Heaven of Miami, Inc., 947 So. 2d 557, 559 (Fla. 3d DCA 2006).

B. The Trial Court Misapplied the Relevant Burden

i. The Verified Return of Service is presumptively valid.

The lower court erred by failing to shift the burden of proof to Weinberg Pinto. The trial court's error is evident on the face of the order which finds:

> 1. **The Plaintiff**, BLUE AGAVE IMPORTS, LLC. ("Plaintiff") **failed to rebut the claims** in the Motion to Quash **that Service was improper**. The Plaintiff did not produce the Process Server or Private Investigator to rebut said claims.

(App. 198). Importantly, Weinberg Pinto did not challenge the facial validity of the return of service and, as set for the below, the Verified Return of Service was entitled to a presumption of validity as a matter of law. As such, it was Weinberg Pinto's burden to rebut the validity of service of process, and the lower court erred by imposing the burden of proof exclusively on the Plaintiff. The error requires reversal.

In Robles-Martinez, the defendants sought review of a trial court's order denying their motion to quash service of process, asserting that the court applied the incorrect legal standard. Robles-Martinez v. Diaz, Reus & Targ, LLP, 88 So. 3d 177, 180 (Fla. 3d DCA 2011). The defendants in Robles-Martinez contended there was not competent substantial evidence to conclude substituted service was properly effectuated. Id. at 178. On review, the Court upheld service of process, and clarified the parties' burdens by instructing how the burdens must shift depending on the basis for the challenge to service. Robles-Martinez, at 180.

The Court distinguished between challenges alleging a facially defective service of process versus those challenges that assert an

"invalid" service of process. Id. The distinction is critical in applying the proper burden of proof. The Court instructed:

> **[Defendants'] affidavits do not challenge the facial regularity of the return**; instead, the affidavits challenge the validity of the service of process itself. **There is a significant difference between a facially defective return of service** (for example, a return which, on its face, fails to contain the information required by statute) **and an invalid service of process** (for example, a claim that the residence where service was effectuated was not the defendant's usual place of abode). **This distinction is essential in properly allocating the burden of proof and production.**

Robles-Martinez, at 180 (emphasis added). Importantly, when "the return of service is regular on its face, the party challenging the service has the burden of overcoming the presumption of its validity by presenting clear and convincing evidence." Id. (internal citation omitted).

Here, as in Robles-Martinez, the verified return of service for Weinberg Pinto is regular on its face, containing all of the information in compliance with the specific requirements of section 48.031(1)(a). (App. 41). Weinberg Pinto's Motion to Vacate and Quash Service of Process did not challenge the verified return of service's facial validity, but rather sought to impeach it by contending that the

defendant was not personally served, he does not live at the address were service was made, and the person who accepted service does not live where service was made. (App. 46-61).

Thus, as in Robles-Martinez, Florida law required that the lower court find the verified return of service was presumptively valid. Upon such presumption, the burden shifted to Weinberg Pinto to overcome the presumed validity with clear and convincing evidence that the place of service was not his usual place of abode. Weinberg Pinto failed to proffer clear and convincing evidence and instead submitted affidavits that constitute legally insufficient denials.

ii. Weinberg Pinto Did Not Meet His Burden of Clear and Convincing Proof.

The lower court erred when it required the *plaintiff* to *rebut* residency that was never established by Weinberg Pinto. The trial court quashed service of process based on Weinberg Pinto's mere denial as set forth in two affidavits, from Weinberg Pinto and his mother's housekeeper, Adriana Perez, respectively. (App. 46-61). Weinberg Pinto's affidavit in support of his Motion to Quash Service of Process and Vacate Judicial Default cannot be said to offer clear and convincing evidence because the affidavits consist solely of

statements of denial. The substance of Weinberg Pinto's affidavit is set forth below:

1. My name is Jonathan Alexis Weinberg Pinto.
2. I am a Citizen of Mexico. I am not a Citizen of the United States of America.
3. **I have not resided at** 1524 Island Blvd., Unit 13, Aventura, Florida 33160 since November 2021.
4. **I have never resided at** 2851 NE 183 Street, Suite 1408 E, Aventura, FL 33160.
5. **I have never resided at** 5500 Island Estates Dr., Apt. 1004, Aventura, FL 33160.
6. **Adriana Perez is not** my mother.
7. **I have not been served** with any Summons, Complaint with Exhibits or Petition (collectively referred to herein as "Process") in connection with the above styled action.
8. **I have never received** a copy of Process by registered or certified mail.

(App. 58-59) (emphasis added). Other than his name and citizenship, *every* statement in Weinberg-Pinto's affidavit constitutes a mere denial.

Adriana Perez's affidavit similarly fails under scrutiny. She admits to receiving service, admits she is employed by Weinberg Pinto's *mother*, who is also alleged to be evading service after laundering money for the Sinaloa cartel, but claims, "Jonathan Alexis Weinberg Pinto does not reside at 5500 Island Estates Drive, Apt.

1004, Aventura, Florida 33160 *and has never resided there*." (App.60) (emphasis added). Notably, Perez's affidavit does not state how she knows Weinberg Pinto or even that she knows him at all. (App. 60). It does not state how long she has been employed at the residence or on what basis she can attest that he "*never*" lived at the residence. (App. 60). As with Weinberg Pinto's affidavit, Perez's affidavit is mere denial. Moreover, Sylvia Donna Pinto De Weinberg the party identified as having accepted service is also incentivized to lie about her whereabouts due to her family's alleged participation in laundering money for the Sinaloa cartel. Under the circumstances, the need for credible corroborating evidence is necessarily heightened.

At bottom, the insufficiency of the affidavits is fatal to the Motion as "**a defendant may not impeach the validity of the summons with a simple denial of service,** but must present 'clear and convincing evidence' to corroborate his denial." Johnson v. Christiana Tr., 166 So.3d 940, 942–43 (Fla. 4th DCA 2015) citing Telf Corp. v. Gomez, 671 So.2d 818, 819 (Fla. 3d DCA 1996) and Slomowitz v. Walker, 429 So.2d 797, 799 (Fla. 4th DCA 1983) (holding that "clear and convincing evidence" "must be presented to

corroborate the defendant's denial of service," because permitting "a defendant to impeach a summons by simply denying service would create chaos in the judicial system"). Clear and convincing evidence "**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." Preudhomme v. Matthews, 194 So.3d 1057, 1058 (Fla. 4th DCA 2016) (emphasis added).

The facts of this case are starkly similar to those in Florida Nat. Bank v. Halphen, 641 So. 2d 495, 496 (Fla. 3d DCA 1994). In that case, the Court affirmed a trial court ruling denying a motion to quash where the defendant had been served at her mother's house. Id. The Court held that the defendant had not satisfied the "high burden of proof" because "**denial by the defendant that she was personally served and testimony that she was not a resident at her mother's address, where she visited, is insufficient to impeach service**." Id. (emphasis added). Where, as here, a defendant attacks the service of process with uncorroborated affidavits merely denying that the defendant resides at the address where service was

accepted, the lower court must conclude that the "high burden of demonstrating the invalidity of [] service" has not been met. Telf Corp., 819.

Contrary to Halphen et al., the lower court in this case misapprehended the burden of proof as requiring the defendant "to prove a negative." (App. 178). The below excerpt from the hearing on the Defendant's Motion to Quash Service of Process and Vacate Judicial Default demonstrates the lower court's error:

> MR. EHRENSTEIN: [Defendant asserts he] never lived there [but] if that's the position you're going to take, you must show corroborating evidence, including such things as a deed, a lease, something from the United States Postal Service.
>
> **THE COURT**: **But you're asking, Mr. Ehrenstein, you're asking them to prove the negative.**
>
> MR. EHRENSTEIN: No. **I'm asking them to prove the positive. Where is he? There is no statement in his affidavit that says, oh, and, by the way, I never lived there. I live here.** He doesn't say that. **He doesn't give us any evidence that he is anywhere other than where the process server said that he was.** That's presumptively valid on its face, and their evidence is only this affidavit. And as the Court said in Johnson versus Christiana, beyond two affidavits, **the appellant failed to present clear and convincing evidence to corroborate the allegations contained therein to impeach the validity of the summons. There were no driver's license, property appraiser records, a property tax bill, a lease, nothing like that, just as there is nothing like that here. So, for that one independent ground, they failed to carry their burden on the motion to quash.**

(App.178).

Blue Agave provided both a presumptively valid return and evidence that supports Weinberg Pinto's motive to evade service in this case, in the Money Laundering Case, and in the criminal cases. The lower court accepted Weinberg Pinto's denials under the misguided notion that the defendant could not prove a negative despite cases like Telf Corp. v. Gomez, Johnson v. Christiana Tr., Schneiderman v. Cantor, and Preudhomme v. Matthews, which illustrate the type of proof needed to overcome the presumption in favor of valid service. The trial court abused its discretion by misapprehending Weinberg Pinto's burden to quash service of process and failing to shift the burden from Blue Agave to Weinberg Pinto. The trial court further abused its discretion when it accepted mere denials as clear and convincing evidence. Accordingly, the order quashing service of process must be reversed.

C. Weinberg Pinto Failed to Timely Object

The lower court further erred by finding that Weinberg Pinto did not swiftly act to challenge the alleged defective service, on the one hand, but nonetheless granting his motion to quash, on the other.

While true that defective service "suspends personal jurisdiction," it is also true that failure to timely object waives the defect. Schneiderman v. Cantor, 546 So.2d 51, 51 (Fla. 4th DCA 1989) citing, Klosenski v. Flaherty, 116 So.2d 767 (Fla.1959); Tetley v. Lett, 462 So.2d 1126 (Fla. 4th DCA 1984). Indeed, **"where a defendant unduly delays in objecting to defective service, permitting a default and final default judgment to be entered, a court may deny defendant's motion to vacate for failure to timely object.**" Id. citing Ranger Construction Industries, Inc. v. Huff, 499 So.2d 2 (Fla. 4th DCA 1986), Craven v. J.M. Fields, Inc., 226 So.2d 407 (Fla. 4th DCA 1969) (emphasis added).

The Third DCA instructs, "[i]t has long been the law of this state, well understood by practitioners, that '**swift action must be taken upon first receiving knowledge of any default**.'" Lazcar Intern., Inc. v. Caraballo, 957 So. 2d 1191 (Fla. 3d DCA 2007) (emphasis added). The lower court in this case erroneously relieved Weinberg Pinto of his obligation of swiftness when it found:

> **There's no showing that the Defendant unduly delayed** in objecting to the defective service. **It wasn't swift**, **but it wasn't nine months** like Schneiderman.

Transcript 35:3-6. (App. 187).

Application of the controlling standard to the facts of this case establishes that the lower court committed reversible error. Pursuant to the presumptively valid Verified Return of Service, service of the complaint was made on January 24, 2023. (App. 41-43). The order granting the motion for default was entered on April 25, 2023. (App. 44-45). Weinberg Pinto's Money Laundering Case counsel received notice of default on May 3, 2023. (App. 69). More than a month after his lawyer received notice, Weinberg Pinto moved to quash service and set aside default on June 6, 2023 (App. 46), approximately six months after the presumptively valid service.

Highlighting the insufficiency of his Motion, Weinberg Pinto does not provide *any* date to establish when he received actual notice of the complaint. One can assume that Weinberg Pinto had constructive knowledge on January 24, 2023 and actual knowledge at some point before June 6, 2023. Regardless of when in the timeline he gained actual knowledge, Weinberg Pinto's silence on the issue is enough to render the Motion fatally defective because sworn proof of diligence upon learning of the lawsuit is required and here none was proffered. Indeed, given that Weinberg Pinto offered *no* evidence or testimony regarding diligence, there is no basis in the

record for the trial court's finding that Weinberg Pinto did not unduly delay because there is no temporal period in which Weinberg Pinto claims to have acted. The lower court's finding that "There's no showing that the Defendant unduly delayed in objecting to the defective service," is yet another example of the trial court misapplying the parties' burdens. The plaintiff is not required to show that a defendant *did* unduly delay in objecting to service; instead, the burden is on the defendant to show that he *did not.* The evidence to support the defendant's motion to quash is required not from the plaintiff, but from the defendant who bears the burden to prove his own swift action.

Furthermore, "nine months" is hardly the guidepost for timeliness as the lower court's order suggests. Highlighting the trial court's error in this case are numerous holdings that a defendant's delay of several *weeks* is grounds to deny such motions as a matter of law:

- Westinghouse Credit Corp. v. Steven Lake Masonry, Inc., 356 So.2d 1329, 1330 (Fla. 4th DCA 1978) (Absent competent substantial evidence of some exceptional circumstance explaining the delay, "**a six-week delay** in filing a motion to

vacate a default after receiving notice **constitutes a lack of due diligence as a matter of law.**");

- Trinka v. Struna, 913 So.2d 626, 628 (Fla. 4th DCA 2005)(finding "**[t]hat defendant's attorney ignored his duty to act with all due diligence**" where "**more than a month passed** between the discovery of the default and the entry of the final judgment without any attempt to vacate the default");
- Fischer v. Barnett Bank of S. Fla., *N.A.,* 511 So.2d 1087, 1088 (Fla. 3d DCA 1987)(finding a "**five week delay** by the defendants [in filing motion to vacate] **entirely inexcusable**");
- Bayview Tower Condo. Ass'n v. Schweizer, 475 So.2d 982, 983 (Fla. 3d DCA 1985)(finding a **delay of one month "showed a lack of due diligence in seeking relief** after learning of the default and was fatal to the subject motion to vacate filed below");
- Allstate Floridian Ins. Co. v. Ronco Inventions, LLC, 890 So.2d 300, 304 (Fla. 2d DCA 2004)(concluding "**that the seven-week delay here was unreasonable**").

Lazcar, at 1192. (Bold emphasis added)

Applying the foregoing principles to this case, the lower court's findings are contrary to the law. Weinberg Pinto's Motion is so devoid of detail that it lacks any timeframe to ascertain diligence and failed to carry his burden by omitting necessary facts to establish timeliness, diligence, and reasonableness, as required by law. More, Weinberg Pinto's failure, coupled with the trial court's affirmative finding that Weinberg Pinto response was not "swift" required denial of the Motion. To do otherwise when faced with a legally insufficient motion is an abuse of discretion. Accordingly, the lower court's order quashing service of process and vacating the default must be reversed.

D. Weinberg Pinto Did Not Establish Excusable Neglect, A Meritorious Defense, Nor Due Diligence

For a trial court to grant a motion to set aside a default final judgment, the moving party must show three things: "(1) the failure to file a responsive pleading was the result of excusable neglect; (2) the moving party has a meritorious defense; and (3) the moving party acted with due diligence in seeking relief from the default." Lanzar, at 1192 citing Goodwin, at 109. Application of the foregoing standard to Weinberg Pinto's Motion required the lower court to deny it.

As to the first element of excusable neglect, the moving party "must produce sufficient evidence of mistake, accident, excusable neglect or surprise as contemplated by rule 1.540(b) before the court's equity jurisdiction may be invoked." Rodriguez v. Falcones, 314 So.3d 469, 471–72 (Fla. 3d DCA 2020); Bank of New York Mellon v. Peterson, 208 So.3d 1218, 1222 (Fla. 2d DCA 2017) (quoting Rude v. Golden Crown Land Dev. Corp., 521 So.2d 351, 353 (Fla. 2d DCA 1988)) (emphasis added). "It is not permissible to allege that a defaulting party's negligence is excusable without setting forth the facts to support such a conclusion." Westinghouse Elevator Co., a Div. of Westinghouse Elec. Corp. v. DFS Const. Co., 438 So. 2d 125, 126 (Fla. 2d DCA 1983).

Applying the standard here, Weinberg Pinto's Motion unequivocally fails. The Motion is cryptic and evasive—it does not reveal when or how Weinberg Pinto learned of the default or describe what action he undertook to "swiftly" address the default or why the failure to act sooner was excusable. Weinberg Pinto received notice at some point because he filed the Motion asking the trial court for relief. Critically, however, Weinberg Pinto's Motion does not explain what steps he took upon learning of the default, nor any details of

how or when the lawsuit became known to him. The absence of detail is more than just curious. It is fatal to the Motion because it lacks the requisite sworn evidence to establish his burden of excusable neglect.

The second element of a meritorious defense was wholly ignored by the Motion. Florida courts have "repeatedly held that in order to establish a meritorious defense, the defendant must tender either a defensive pleading showing the defense or a sworn motion or affidavit stating the facts supporting the meritorious defense." Hill v. Murphy, 872 So.2d 919, 921 (Fla. 2d DCA 2003) (internal citations omitted); and Perry v. Univ. Cabs, Inc., 344 So.2d 914, 915 (Fla. 3d DCA 1977) ("To entitle the defendant to have the default set aside… it was incumbent upon the defendant to show it had a meritorious defense, and a mere statement to that effect in an unsworn motion was not sufficient. The existence of a meritorious defense should be disclosed in tendering a defensive pleading showing the defense, or by a sworn motion or affidavit stating facts which if proved would be a meritorious defense, where a factual defense is relied on, or by showing legal grounds constituting a meritorious defense where a legal rather than a factual defense is to be relied on."). In this case,

the Motion does not mention the word "defense" nor raise any. The affidavit is similarly silent on this issue. Thus, for this additional reason, the lower court was required to deny the Motion.

The third and final "element of due diligence is determined by examining the facts of each case." Coquina Beach Club Condo. Ass'n, Inc. v. Wagner, 813 So.2d 1061, 1064 (Fla. 2d DCA 2002). In this case, due diligence suffers the same fate as excusable neglect—no explanation or proof is given to explain the delay and Weinberg Pinto makes no affirmative representation of diligence, let alone a showing of it. Because the Motion and affidavits are devoid of facts to establish diligence, the Defendant, Weinberg Pinto failed on the third and final element, as well. Taken alone, the failure of a single element justifies denial of the Motion. Here, the trial court failed to deny the Motion in the face of not just one failed element, but a failure of all three elements required by law.

VI. CONCLUSION

The lower court erred by:

(i) failing to shift the burden of proof to the Weinberg Pinto upon showing of a presumptively valid verified return of service;

(ii) misapprehending the legal standard requiring a defendant to demonstrate swift objection to the exercise of personal jurisdiction and entry of default judgment;

(iii) granting a legally insufficient motion to vacate default that lacked every material element for the requested relief under Florida law.

The lower court's errors constitute an abuse of process. Accordingly, the order quashing service of process and vacating default must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 16, 2023, a copy of the foregoing was electronically filed and served through Florida's e-filing portal on all counsel of record.

By: */s/ Latasha N. Johnson*
Latasha N. Johnson

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is prepared in Bookman Old Style 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).

By: */s/ Latasha N. Johnson*
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