

IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
STATE OF FLORIDA

DANIEL GONZALEZ,
Petitioner,

Case Number: 3D24-1554
L.T. No: 18-36849 CA 01

v.

JORGE AMOR, DANIELA PETERS,
CARLOS PETERS, GONZALO PETERS,
FIRST AMERICAN TITLE INSURANCE CO.,
SEASHORE CLUB SOUTH PROPERTY LLC ,
and PRH SEASHORE CLUB LLC
al.
Respondents.

_____ /

APPELLANT'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

Table of Contents..... 2

Table of Authorities..... 4

Preliminary Statement..... 7

Issue Presented..... 8

Standard of Review..... 9

Summary of Argument..... 10

Statement of the Facts..... 10

Argument..... 22

Point I: The trial court erroneously quashed service of process upon the Argentines when it quashed service based solely upon a defective affidavit of service in violation of Appellant’s due process right to notice and opportunity to be heard when the trial court denied the Appellant the opportunity to sustain its burden of proving service at an evidentiary hearing.....22

Point II: The trial court abused its discretion when it dismissed the case against the Argentines pursuant to Florida Rule of Civil Procedure 1.070(j) in a self-executing order which deprived Appellant of his due process right to an opportunity to be heard, and where Appellant could have established good cause, dismissal was against public policy, and there was no basis to dismiss the action as a sanction for not complying with lower court’s April 28, 2022 Order requiring Appellant to serve the Argentine by July 8, 2022.....32

Point III: The Final Judgment in favor of the Developers and the Escrow Agent should be reversed since it is void ab initio because it was entered in violation of Appellant’s due process right to notice and opportunity to be heard and when there was no order entered dismissing the case against Developers and the Escrow Agent, and where they had filed an answer to the operative complaint.....39

Conclusion..... 40

Certificate of Compliance..... 41

Certificate of Service..... 41

TABLE OF AUTHORITIES

Case Law	Pg. No.
<i>24-7 Bright Star Healthcare, LLC v. Brightstars Helping Hands LLC</i> , No. 6:22-CV-2087-RBD-DAB, 2023 WL 5985199, at *2 (M.D. Fla. Jan. 12, 2023)	25
<i>Abbate v. Provident Nat. Bank</i> , 631 So.2d 312, 313 (Fla. 5 th DCA 1994);	24
<i>Albo v. Martell</i> , No. 3D23-1379, 2024 WL 3433739 (Fla.3 rd DCA July 17, 2024)	36,37, 39,40
<i>Amaran v. Marath</i> , 34 So.3d 88 (Fla. 3 rd 2010);	9
<i>Anthony v. Gary J. Rotella & Assocs., P.A.</i> , 906 So.2d 1205, 1207 (Fla. 4 th DCA 2005);	24
<i>Bennett v. Christiana Bank & Trust Company</i> , 50 So.3d 43, 45 (Fla. 3 ^d DCA 2010).	22
<i>Carter v. Winn–Dixie Store, Inc.</i> , 889 So.2d 960 (Fla. 1 st DCA 2004).	33
<i>Carter v. Lil’ Joe Records</i> , 829 So.2d 953 (Fla. 4 th DCA 2002);	25
<i>Chaffin v. Jacobson</i> , 793 So.2d 102, 103–104 (Fla. 2 ^d DCA 2001).	33,34
<i>Crown Asset Mgmt., LLC v. Bribiesca</i> , No. 3D23-2094, 2024 WL 3167486 (Fla.3 rd DCA June 26, 2024)	37,38
<i>Daniel Gonzalez v. Jorge Amor, et al.</i> , Case Numbers 3D23-131 and 3D23-037 (Fla. 3 rd DCA 2023)	21
<i>Gibson v. Star Collision & Towing, LLC</i> , 381 So.3d 690, 693 (Fla. 2 nd DCA 2024)	27,28
<i>Haney v. Olin Corp.</i> , 245 So.2d 671, 672 (Fla. 4 th DCA 1971).	30
<i>Henzel v. Noel</i> , 598 So.2d 220 (Fla. 5 th DCA 1992)	24
<i>Klosenski v. Flaherty</i> , 116 So.2d 767, 768–69 (Fla. 1959)	24

<i>Kozel v. v. Ostendorf</i> , 629 So. 2d 817 (Fla. 1993)	37,38
<i>Mitschke-Collande v. Skipworth Properties Ltd.</i> , 201 So.3d 660 (Fla. 3 rd DCA 2016)	35
<i>Morgan Stanley Smith Barney, LLC v. Gibraltar Private Bank & Tr. Co.</i> , 162 So.3d 1058, 1060 (Fla. 3d DCA 2015)	9
<i>Nirk v. Bank of Am., N.A.</i> , 94 So.3d 658 (Fla. 4 th DCA 2012);	30
<i>Permenter v. Feurtado</i> , 541 So.2d 1331, 1332 (Fla. 3d DCA 1989)	22
<i>Premier Cap., LLC v. Davalle</i> , 994 So.2d 360, 362 (Fla. 3 rd DCA 2008).	33
<i>Robles-Martinez v. Diaz, Reus & Targ, LLP</i> , 88 So.3d 177, 178 (Fla. 3 rd DCA 2011)	22
<i>Rodriguez v. HSBC Bank USA, N.A. as Tr. for Deutsche Alt-A Sec. Inc., Mortg. Pass Through Certificates Series 2006-AR2</i> , 352 So.3d 8, 12 (Fla. 2 nd DCA 2022)	24,28
<i>Romeo v. U.S. Bank Nat'l Ass'n</i> , 144 So.3d 585, 586 (Fla. 4 th DCA 2014).	20,21
<i>Root v. Little</i> , 721 So.2d 836, 837 (Fla. 5 th DCA 1998)	32
<i>Sadlak v. Nationstar Mortg., LLC</i> , 252 So.3d 302, 302 (Fla. 3 rd DCA 2018).	9
<i>Skrbic v. QCRC Assocs. Corp.</i> , 761 So.2d 349, 354 (Fla. 3d DCA 2000)	33
<i>Sly v. McKeithen</i> , 27 So.3d 86 (Fla. 1 st DCA 2009)	9
<i>Vives v. Wells Fargo Bank, N.A.</i> , 128 So.3d 9, 15–16 (Fla. 3d DCA 2012)	23

<i>Treaties, Statutes and Rules</i>	Pg. No.
Hague Convention, 20 U.S.T. 361	14
Florida Statute §48.21	17,25,26,27,29
Florida Statute §48.31	29
Florida Statute §48.194	14
Florida Rule of Civil Procedure 1.070(j)	2, 8,9,10,14, 16, 32, 33,36
Florida Rule of Appellate Procedure 9.045	41
Florida Rule of Judicial Administration 2.516	41

PRELIMINARY STATEMENT

Appellant, DANIEL GONZALEZ, appeals to the District Court of Appeal, Third District, the Final Judgment of Dismissal with Prejudice rendered by the Honorable Migna Sanchez Llorens, Circuit Court Judge for Miami Dade County on August 12, 2024. [R. 936-943]

Throughout the brief Appellant, DANIEL GONZALEZ, will be referred to as “Appellant”.

Appellees, JORGE AMOR, DANIELA PETERS, CARLOS PETERS and GONZALO PETERS will be collectively referred to as “the Argentines”.

Appellee, FIRST AMERICAN TITLE INSURANCE CO., will be referred to as “the Escrow Agent”.

Appellees, SEASHORE CLUB SOUTH PROPERTY LLC and PRH SEASHORE CLUB LLC will be collectively referred to as “the Developers”

The Record on Appeal shall be cited as “[ROA. Page Number].”

ISSUES PRESENTED

1. Did the trial court erroneously quashed service of process upon the Argentines when it quashed service based solely upon a defective affidavit of service in violation of Appellant's due process right to notice and opportunity to be heard when the trial court denied the Appellant the opportunity to sustain its burden of permitting Appellant to establish service at an evidentiary hearing?
2. Did the trial court abuse its discretion when it dismissed the case against the Argentines pursuant to Florida Rule of Civil Procedure 1.070(j) in a self-executing order which deprived Appellant of his due process right to an opportunity to be heard and where Appellant could have established good cause, and there was no basis to dismiss the action as a sanction for not complying with lower court's April 28, 2022 Order requiring Appellant to serve the Argentines by July 8, 2022?
3. Did the trial court err by entering a final judgment in favor of the Developers and the Escrow Agent since it is void ab initio because it was entered in violation of Appellant's due process right to notice and opportunity to be heard and when there was no order entered dismissing the case against Developers and the Escrow Agent, and where they had filed an answer to the operative complaint?

STANDARD OF REVIEW

An appellate court reviews a trial court's order quashing service of process de novo. *Morgan Stanley Smith Barney, LLC v. Gibraltar Private Bank & Tr. Co.*, 162 So.3d 1058, 1060 (Fla. 3d DCA 2015); *Sadlak v. Nationstar Mortg., LLC*, 252 So.3d 302, 302 (Fla. 3rd DCA 2018).

An appellate court reviews a dismissal pursuant to Florida Rule of Civil Procedure 1.070(j) for an abuse of discretion. *Amaran v. Marath*, 34 So.3d 88 (Fla. 3rd 2010); *Sly v. McKeithen*, 27 So.3d 86 (Fla. 1st DCA 2009).

SUMMARY OF ARGUMENTS

The trial Court erroneously quashed service of process upon the Argentines when it quashed service based solely upon a defective affidavit of service in violation of Appellant's due process right to notice and opportunity to be heard when the trial court denied the Appellant the opportunity to sustain its burden of proving service at an evidentiary hearing.

The trial court abused its discretion when it dismissed the case against the Argentines pursuant to Florida Rule of Civil Procedure 1.070(j) in a self-executing order which deprived Appellant of his due process right to an opportunity to be heard, and where Appellant could have established good cause, and there was no basis to dismiss the action as a sanction for not complying with lower court's April 28, 2022 Order requiring Appellant to serve the Argentine by July 8, 2022.

The Final Judgment in favor of the Developers and the Escrow Agent should be reversed since it is void ab initio because it was entered in violation of Appellant's due process right to notice and opportunity to be heard and when there was no order entered dismissing the case

against Developers and the Escrow Agent, and where they had filed an answer to the operative complaint.

STATEMENT OF FACTS

On October 30, 2018, Appellant filed a complaint against Appellees. The complaint alleged that Carlos Amor and Daniela Peters, who are Argentinian nationals and licensed Argentinian Attorneys, met with Appellant, their client, in Miami, Florida and solicited him to enter into an real estate venture. The venture would be with Daniela Peters' father, Carlos Peters, who is also an Argentinian national. [ROA. 27] The venture concerned purchasing real property located at 18975 Collins Avenue, Unit 3800, Florida 33160 ("the property") preconstruction for \$4,800,000 and then promptly reselling it for profit. [ROA.27] The property was located in the Armani Tower, in Miami, Florida. [ROA. 27] Appellant was to invest in a partnership with Carlos Peters. [ROA. 27]. Appellant was to be a partner in consideration for providing 25% of the purchase price of the property. Appellant was supposed to receive a return of the investment and a percentage of the profit from the resale of the property. Carlos Peters was also supposed to pay 25% of the purchase price and obtain financing for the balance of the purchase price. [ROA 27-28]. Daniela Peters was to create the necessary paperwork which was to reflect Appellant's ownership interest in the real estate venture. [ROA. 28]

The sales contract for the property listed Gonzalo Peters, an Argentinian national and Daniela Peters' brother as the Buyer of the property. [ROA. 28; 37]

Daniela Peters instructed Appellant to wire \$490,000 into Escrow Agent's escrow account. This was the Developers' closing agent for the sale of the property. [ROA. 104] On July 30, 2014 Appellant wired the initial \$480,000. [ROA. 28; 326]

Shortly thereafter, pursuant to Daniela Peters' instruction, Appellant wired an additional \$480,000 to the Escrow Agent's escrow account. [ROA.327-0329]

Subsequent to wiring \$980,000 per the sales and purchase agreements, Appellant requested that Daniela Peters provide him with a copy of the documents indicating his interest in the business venture since he had to provide it the Argentinian Tax Authorities. [ROA. 23]

This is when Daniela Peters advised Appellant that he was not listed as having an ownership interest in the company that was purchasing the property, and that the only owners reflected in the corporate documents were Carlos Peters and Gonzalo Peters, Daniela Peters' brother. [ROA. 275] As a result, Appellant demanded that the Argentines promptly provide him with something in writing

memorializing his investment and guaranteeing the return of his investment plus the profit from the sale or return his money. [ROA.275]

The Argentines refused to honor Appellant's demand and would not return Appellant's money to him. [ROA.278]

As a result, Appellant filed a lawsuit against the Argentines to establish an equitable claim of lien on the property, to establish a constructive trust holding title to the property and for unjust enrichment. Appellant also filed a lis pendens on the property. [ROA 72].

Appellant attempted service via the Hague Convention. Also, on January 23, 2019, Appellant moved the court to appoint a process server pursuant to Florida Rule of Civil Procedure 1.070(b) to serve the Argentines. [ROA 74-75]. The motion was granted on February 25, 2019.

On March 12, 2019, Appellant moved for the entry of a judicial default, asserting that he had perfected service over the Argentines by serving them in accordance with the Hague Convention pursuant to 20 U.S.T. 361 and Fla.Stat.48.194. [ROA 77-78].

On March 25, 2019, the Argentines filed a motion to quash service of process based upon the fact that Argentina does not recognize or subscribe the Hague Convention, and therefore service via the Hague Convention was invalid service.[ROA 89-94].

Prior to the hearing on the motion for judicial default, Appellant amended the complaint on June 28, 2019. The amended complaint added the Developers and the Escrow Agent that was holding Appellant's funds in escrow.[ROA 105-112]. Developer and the Escrow Agent filed a motion to dismiss the amended complaint. [ROA 129-137; 138-144].

On January 6, 2020, Appellant filed a motion to compel the Escrow Agent to deposit Appellant's \$980,000 into the court registry. [ROA 145-148].

On May 22, 2020, Appellant moved for leave to amend to file a Second Amended Complaint. [ROA.162-225]. The amendment was to add jurisdictional allegations and additional causes of action against the Argentines, including claims for unjust enrichment, fraud, breach of contract, breach of fiduciary duty and replevin. The amendment also included allegations that the Developers and the Escrow Agent knew that Appellant had contended that his funds were procured

through fraud, and thus there should be an equitable lien on the property and that the Escrow Agent hold the money in a constructive trust. [ROA 162-225].

On July 6, 2020, the Argentines filed a motion to dismiss pursuant to Fla.R.Civ.P. 1.070(j) for failing to serve the Argentines within 120 days. ROA 250-261].

On July 8, 2020, the trial judge heard the Argentines' motions to quash and motion to dismiss, and granted the motion to quash but denied the motion to dismiss. The court also granted Appellant 75 days to serve the Argentine Appellees. [ROA 262-263].

On August 21, 2020, the Court granted Plaintiff leave to amend, and the second amended complaint and was deemed filed on the same date. [ROA. 329].

On September 29, 2020, the Argentines renewed their motion to dismiss pursuant to Fla.R.Civ.P. 1.070(j) because service has not occurred within 75 days as required by the court's July 8, 2020 Order. [352-354; 355-364; 365-378].

Shortly thereafter, on October 12, 2020, Appellant filed affidavits of service for each of the Argentines. The affidavits of service were authored by MATIAS GONZALEZ DEL CASTILLO, who was the process

server appointed by the Court on February 5, 2019. According to the returns of service, Daniela Peters and Carlos Peters were personally served, and the other Argentines were served via substituted service by serving Daniela Peters, a person of suitable age and discretion and who resided with the other Argentines. [ROA 491-502].

Appellant filed a third amended complaint on January 18, 2021. [ROA 379-446]. This was the operative complaint at the time the case was dismissed with prejudice. Again, the Escrow Agent and Developer Appellees filed motions to dismiss the third amended complaint.

On March 25, 2021, six months after service of process was alleged to have occurred, the Argentines filed a motion to quash service. [ROA.482-518] Notably, while the motion argued the returns of service were not valid, the motion never asserts that the contents contained in the affidavit are not true, or that they were not served with the summons and complaint. Instead, the motion relied entirely upon the form of the affidavit being insufficient for failing to comply with Florida Statute §48.21(1). [ROA 482-518].

On April 28, 2021, the court entered an order granting in part and denying in part the Escrow Agent and Developer Appellees' motion to dismiss. [ROA 519-524]. The Court dismissed all of the counts

against the Escrow Agent except for the counts for Unjust Enrichment and Conversion. The Court denied the Developer Appellees' motion to dismiss *en toto*. [R.522].¹

Both the Escrow Agent and the Developers answered the amended complaint on June 1, 2021. [ROA. 533-552; 553-562].

On September 7, 2021, Appellant filed a notice of filing containing the previously filed affidavits of service for each of the Argentine Appellees, except this time the returns included an apostille. [R.563-572; 573-582; 583-592 and 593-602]. On January 6, 2022, an amended return of service was filed. [ROA 628-639].

On April 6, 2022, the Court granted the Argentine's motion to quash service and dismiss the case. However, it extended the time to perfect service of process. [ROA 695-696]. The Argentines moved for clarification, since the Order did not provide a time to serve them. [ROA 607-744].

¹The April 28, 2021 Order was amended to permit the Escrow Agent and Developer Appellees 20 days to answer the third amended complaint. [ROA. 525-530].

Subsequently, on April 25, 2022 Appellant filed Affidavits of service with the apostille and translations for each of the Argentine Appellees. [ROA 745-758; 759-772; 773-786; 787-800].

On April 26, 2024, the Court had a hearing on the motion for clarification, and granted the motion which was memorialized on April 28, 2022. The April 28, 2022 Order amended the April 6, 2022 Order and states the following:

1. Plaintiffs shall serve the Defendants with process and file with the Clerk of Court such necessary documentation reflecting valid service of process on or before July 8, 2022.
2. Should Plaintiff fail to submit with the Clerk of Court by July 8, 2022 all necessary documentation demonstrating valid service of process on Defendants, Plaintiff's claims in this case shall stand dismissed with prejudice as to Jorge Amor, Daniela Peters, Carlos Peters and Gonzalo Peters without further order of the court.
3. This Order and its effect is self-executing.

[ROA801-802]. Significantly, the Order was only applicable to the Argentines. It was not applicable to the Developers or the Escrow Agent. Appellant moved for rehearing which was denied on May 24, 2022. [ROA 803-811; 812-813].

On August 4, 2022, Appellant filed a notice of appeal seeking to appeal the court's April 28, 2022 Order. [ROA 853-856]. The appeal was subsequently dismissed on August 29, 2022 as being untimely and a non-appealable non-final order. [ROA 857].

As a result, on August 29, 2022, Appellant moved the lower court for entry of a final judgment so that it could appeal the dismissal with prejudice. [ROA. 858-860]. The court heard the motion on November 22, 2022 and orally granted it and advised it would enter a final judgment so that Appellant could appeal the dismissal. [ROA 893]. Notwithstanding the court's orally granting the motion, on December 12, 2022, the court entered an Order denying the motion for entry of final judgment based upon a lack of jurisdiction. [ROA 879-881]. Additionally, the clerk of the court closed the case as if the claims against the Developer and Escrow Agent were also dismissed. Appellant moved to set aside and vacate the December 12, 2022 Order, which was denied on December 22, 2022. [ROA. 895-915].

Appellant filed a notice of appeal and simultaneously filed a petition for a writ of certiorari challenging the December 12, 2022 Order. *See Daniel Gonzalez v. Jorge Amor, et al.*, Case Numbers 3D23-

131 and 3D23-037. On July 11, 2023, this Court again dismissed the appeal stating:

To date, no final order of the trial court has been filed in this Court. In so stating, this Court re-affirms the decision of the prior panel that the April 28, 2022, order, which was contingent on future events, was not a final order because it could not become final until a court ruled that the necessary contingent event had happened, which has not been done to date based on the record before us. [ROA 929].

On November 21, 2023, Appellant again, requested that the court enter a final judgment so that it could appeal the dismissal of the case. [ROA 960-964]. The court heard the motion on May 20, 2024, and on August 12, 2024, the court entered a Final Judgment of dismissal in favor of all of the Appellees. [ROA 931-935].

On September 3, 2024, Appellant timely filed a notice of appeal of the August 12, 2024 Final Judgment dismissing the case as to all of the Appellees. [ROA 936-943].

This appeal now follows.

ARGUMENT

POINT I

The trial court erroneously quashed service of process upon the Argentines when it quashed service based solely upon a defective affidavit of service in violation of Appellant's due process right to notice and opportunity to be heard when the trial court denied the Appellant the opportunity to sustain its burden of proving service at an evidentiary hearing.

A summons properly issued and served is the method by which a court acquires jurisdiction over a defendant. *Bennett v. Christiana Bank & Trust Company*, 50 So.3d 43, 45 (Fla. 3d DCA 2010). When the Plaintiff fails to effect valid service of process, any judgment entered against the non-served defendant should be vacated as void. *Permenter v. Feurtado*, 541 So.2d 1331, 1332 (Fla. 3d DCA 1989).

The proponent of service bears the ultimate burden of proving valid service of process. *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So.3d 177, 178 (Fla. 3rd DCA 2011). If the return of service is regular on its face, the court can presume that service was valid and that it has lawfully obtained personal jurisdiction over the party served, unless that party proves by clear and convincing evidence that service was not valid. *Romeo v. U.S. Bank Nat'l Ass'n*, 144 So.3d 585, 586 (Fla. 4th DCA 2014). If the return of service is defective on its face, the court cannot rely on it as evidence that service was valid, and the party seeking to

invoke the court's jurisdiction retains the burden of proving valid service and must prove valid service by other means. *See Romeo*, 144 So.3d at 586, 587–88; *see also Vives v. Wells Fargo Bank, N.A.*, 128 So.3d 9, 15–16 (Fla. 3d DCA 2012).

Here, Appellant asserts that it served process pursuant to Florida Statute §48.031 which states in pertinent part:

48.031 Service of process generally; service of witness subpoenas.—

(1)(a) 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 usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.

Significantly, at no time did any of the Argentines ever provide an affidavit, verification or other declaration that stated (1) they were not properly served with a summons and complaint; (2) that they did not receive a copy of the summons and complaint or (3) that they were unaware of the lawsuit. In other words, the Argentines received a copy of the summons and complaint and they were well aware of the lawsuit. The Argentines never filed anything that asserted that they were not served properly.

Instead, the Argentines' sole contention is that the affidavits of service are defective because it did not contain the required statutory language. However, a defective affidavit of service does not necessarily render service invalid.

The return of service is not part of the service, either to add to or detract from it, but is merely evidence to enable a trial judge to conclude that the court has acquired jurisdiction of the person of the defendant, or has not done so, as the case may be. *Klosenski v. Flaherty*, 116 So.2d 767, 768–69 (Fla. 1959). There may be valid service and a defective return, or there may be invalid service and a return showing valid service. *Id.* at 769; *Rodriguez v. HSBC Bank USA, N.A. as Tr. for Deutsche Alt-A Sec. Inc., Mortg. Pass Through Certificates Series 2006-AR2*, 352 So.3d 8, 12 (Fla. 2nd DCA 2022); *Klosenski v. Flaherty*, 116 So 2d at 768–69 (Fla. 1959).

While the undersigned acknowledges that the statutes regulating service of process are to be strictly construed, the purpose of the strict construction is to assure that a defendant is notified of the proceedings. *Henzel v. Noel*, 598 So.2d 220 (Fla. 5th DCA 1992); *Abbate v. Provident Nat. Bank*, 631 So.2d 312, 313 (Fla. 5th DCA 1994); *Anthony v. Gary J. Rotella & Assocs., P.A.*, 906 So.2d 1205, 1207 (Fla.

4th DCA 2005); *Carter v. Lil' Joe Records*, 829 So.2d 953 (Fla. 4th DCA 2002); *24-7 Bright Star Healthcare, LLC v. Brightstars Helping Hands LLC*, No. 6:22-CV-2087-RBD-DAB, 2023 WL 5985199, at *2 (M.D. Fla. Jan. 12, 2023).

Here, there is no doubt that the Argentines had notice of the proceedings, the issue is what to do with the defective affidavits of service.² Not once did any of the Argentines' motions to quash ever complain that they did not receive a copy of the lawsuit.

Here, there were amended affidavits of service that were filed by the special process server. The first amended affidavit of service states that on September 22, 2020, Matias Gonzalez Del Castillo, the individual that was specially appointed by the lower court to serve process, personally served Carlos Peters at Calle Francisco Bucanelli 3469, Benos Aires Argentina. [ROA 628-630]. The second amended states that on September 22, 2020, Matias Gonzalez Del Castillo, the individual that was specially appointed by the lower court to serve process, personally served Daniela Peters at the address of Pasaje Islandia 553, Buenos Aires, Argentina by the same individual serving

² Appellant concedes that the affidavit does not contain the required language in Florida Statute §48.21(1).

her individually. [ROA The affidavit states a true copy of summons and pleadings contained a date and hour of service that was placed on there by the specially appointed process server. The affidavit was sworn to, contained a Spanish translation and an apostille. [ROA 631-633].

The third affidavit of service states that on September 22, 2020, Matias Gonzalez Del Castillo, the individual that was especially appointed by the lower court served Gonzalo Peters by serving his spouse at their address of Jose De Andronequi 3587, Ciudad de Buenos Aires, Argentina. [ROA. 634-636].

The last amended affidavit states that on September 22, 2020, Matias Gonzalez Del Castillo, the individual that was especially appointed by the lower court served Jorge Amor by serving his spouse Daniela Peters at their address of Pasaje Islandia, Ciudad de Buenos Aires, Argentina. [ROA 637-638]

Again, the Argentines do not complain about service, instead they complain that the return of service was not proper as it did not comply with Florida Statute §48.21(1). As mentioned above, 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). See *Gibson v. Star Collision & Towing, LLC*, 381 So.3d 690, 693 (Fla. 2nd DCA 2024).

The failure to comply with Florida Statute §48.21(1) does not conclusively mean that service is invalid. There is no language contained in that statute which states that the failure to comply with that statute conclusively establishes service to be invalid. In fact, subsection 2 of that statute states:

(2) A failure to state the facts or to include the signature required by subsection (1) invalidates the service, but the return is amendable to state the facts or to include the signature at any time on application to the court from which the process issued. On amendment, service is as effective as if the return had originally stated the omitted facts or included the signature. A failure to state all the facts in or to include the signature on the return shall subject the person effecting service to a fine not exceeding \$10, in the court's discretion.

So subsection (2) permits the server to amend the return of service, and if amended, service is deemed effective from the date of the amended. If not amended to correct the error, the statute does not mean that service is conclusively invalid. If the return of service is defective and not sufficiently amended to correct the defect, the party seeking to invoke the court's jurisdiction retains the burden of proof to

demonstrate valid service occurred despite the facially invalid return. *See Rodriguez v. HSBC Bank USA, N.A. as Tr. for Deutsche Alt-A Sec. Inc., Mortg. Pass Through Certificates Series 2006-AR2*, 352 So.3d 8, 13 (Fla. 4th DCA 2022) (“If the return of service is defective on its face, however, it cannot be relied on as evidence that service was valid, and the party seeking to invoke the court's jurisdiction retains the burden of proving valid service and must prove valid service by other means.”).

If a return of service is defective and not sufficiently amended to correct the defect, the party seeking to invoke the court's jurisdiction retains their burden of proof to demonstrate valid service despite the facially invalid return. *See Rodriguez v. HSBC Bank USA, N.A. as Tr. for Deutsche Alt-A Sec. Inc., Mortg. Pass Through Certificates Series 2006-AR2*, 352 So.3d 8, 13 (Fla. 4th DCA 2022) (“If the return of service is defective on its face, however, it cannot be relied on as evidence that service was valid, and the party seeking to invoke the court's jurisdiction retains the burden of proving valid service and must prove valid service by other means.”); *Gibson v. Star Collision & Towing, LLC*, 381 So.3d 690, 693 (Fla. 2nd DCA 2024).

Here the lower court made two errors. First, the lower court should have granted Appellant the right to amend the affidavit, if it concluded it was defective, so that it could comply with Florida Statute §48.21. Appellant specifically requested the opportunity to amend the affidavit of service during the September 9, 2021 hearing. However, he was not permitted to amend the affidavit as the motion to quash was granted. The second error is that the lower court improperly failed to hold an evidentiary hearing to permit Appellant the opportunity to meet his burden of proving valid service by other means, and instead entered a self-executing order dismissing the case with prejudice unless service occurred within 60 days from the date of the April 28, 2024 Order. In other words, the lower wrongfully concluded that an invalid affidavit of service was the equivalent of invalid service. However, such a conclusion is contrary to the law, and therefore the lower court's dismissal with prejudice based upon an invalid return of service was reversible error.

Lastly on this issue, the affidavits of service state that "a true copy of summons and pleadings contained a date and hour of service that was placed on there by the specially appointed process server." Again, while Florida Statute §48.31 also requires the initials of the individual

that served the summons and complaint, which was omitted from the return of service. However, the strict observance of the service statutes is required in order to assure that a defendant receives notice of the proceedings filed. *Nirk v. Bank of Am., N.A.*, 94 So.3d 658 (Fla. 4th DCA 2012); *Electro Eng'g Products Co., Inc. v. Lewis*, 352 So.2d 862, 865 (Fla.1977). As we noted in *Haney v. Olin Corp.*, 245 So.2d 671, 672 (Fla. 4th DCA 1971). “The major purpose of the constitutional provision which guarantees ‘due process’ is to make certain that when a person is sued he has notice of the suit and an opportunity to defend.” *Nirk v. Bank of Am., N.A.*, 94 So.3d 658 (Fla. 4th DCA 2012).

Here, there was no question that the Argentines had notice of the lawsuit against them, not only because they have never stated otherwise, but again, the Argentines’ counsel stated that they could not keep looking at docket. This is not a case where noting the initials of the server on the copy of the summons left with the person to be served does not insure that the defendant receives due process notice. Notice of the suit was provided such that the Argentines had an opportunity to defend. Moreover, if the Argentines are watching the docket as asserted by opposing counsel, then they know who the process server is since his name is on the affidavit of service.

As such, the Final Judgment as to the Argentines should be reversed and the case should be remanded for an evidentiary hearing on the issue of whether service upon the Argentines was valid.

POINT II

The trial court abused its discretion when it dismissed the case against the Argentines pursuant to Florida Rule of Civil Procedure 1.070(j) in a self-executing order which deprived Appellant of his due process right to an opportunity to be heard, and where Appellant could have established good cause, dismissal was against public policy, and there was no basis to dismiss the action as a sanction for not complying with lower court’s April 28, 2024 Order requiring Appellant to serve the Argentine by July 8, 2022.

Florida Rule of Civil Procedure 1.070(J) provides pertinent part:

(j) Summons; Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period....

That bedrock principle supports the proposition that Rule 1.070(j) is intended to be “a case management tool, not an additional statute of limitations cutting off liability of a tortfeasor.” *Root v. Little*, 721 So.2d 836, 837 (Fla. 5th DCA 1998).

Rule 1.070(j) provides a trial court with three options when service has not been perfected within 120 days of the filing of the complaint. The options are: “(1) direct that service be effected within a specified time; (2) dismiss the action without prejudice; or (3) drop [the unserved]

defendant as a party.” *Premier Cap., LLC v. Davalle*, 994 So.2d 360, 362 (Fla. 3rd DCA 2008). *Chaffin v. Jacobson*, 793 So.2d 102, 103–104 (Fla. 2d DCA 2001). Where good cause or excusable neglect for failure to make timely service has been demonstrated, a trial court must extend the time for service “and has no discretion to do otherwise.” *Id.* at 104. Where no good cause or excusable neglect exists, the trial court is left to exercise its discretion as to which of the three options to select, except where the statute of limitations has run. As such, even if no showing of good cause or excusable neglect is presented, the trial court has the option to exercise its discretion to extend the time for service. *Id.*; *Carter v. Winn–Dixie Store, Inc.*, 889 So.2d 960 (Fla. 1st DCA 2004). Where the statute of limitations has run, discretion should normally be exercised in favor of extending the time for service of process.

Moreover, discretion in these circumstances must be exercised with the understanding that Florida has a long-standing policy in favor of resolving civil disputes on the merits. Furthermore, the purpose of Rule 1.070(j) is to speed the progress of cases on the civil docket, but not to give defendants a “free” dismissal with prejudice. *Skrbic v. QCRC Assocs. Corp.*, 761 So.2d 349, 354 (Fla. 3d DCA 2000). Thus, where there has been no showing of good cause or excusable neglect, but the

statute of limitations has run, discretion should normally be exercised in favor of giving the plaintiff an extension of time to accomplish service.

Id.

In this case, the trial court erroneously dismissed the case with prejudice for two reasons. The first is that it entered a self-executing order dismissing the case with prejudice. The second error, is that there was good cause for a further extension of time.

Here, the record demonstrates diligence and good cause for failure to serve the Argentines within 120 days of filing the complaint and the extensions provided by the lower court. The time for serving ? should, therefore, have been extended. Even if Appellant was not diligent and had failed to demonstrate either good cause or excusable neglect, he still should have been afforded an opportunity to serve Argentines because the statute of limitations on Appellant's claims had now run. In situations where the statute of limitations has run, the trial court should normally exercise discretion in favor of giving the plaintiff additional time to perfect service. *Chaffin v. Jacobson*, 793 So.2d 102, 104 (Fla. 2d DCA 2001).

This was not a case where Appellant sat idly by and did nothing to serve the Argentines. At the outset, First, albeit incorrectly, Appellant

sought to serve the Argentines via the Hauge Convention. In fact, Appellant thought that it had properly served the Argentines and was ready to default them. Appellants also obtained a specially appointed process server, who according to the special process server served the summons and complaint upon the Argentines.

It should also be kept in mind that during the time service was trying to be perfected, the world was in middle of a pandemic, Argentina included. In fact, on March 19, 2020, Argentina had a nationwide lockdown. *Argentina announces mandatory quarantine to curb coronavirus". Reuters. 19 March 2020. Retrieved 20 March 2020; Do Rosario, Jorgelina; Gillespie, Patrick (20 March 2020). "Argentina Orders 'Exceptional' Lockdown in Bid to Stem Virus". Bloomberg News.* This delayed service of process significantly, but eventually, and as contended above, the Argentines were served with the summons and complaint.

Moreover, as mentioned above, at the time the lower court had dismissed the case, the statute of limitations had run on all of the causes of action that Appellant had against the Argentines. See *Mitschke-Collande v. Skipworth Properties Ltd.*, 201 So.3d 660 (Fla. 3rd DCA 2016)(Heirs were not required to establish good cause or excusable

neglect to avoid dismissal of their action with prejudice for failure to serve process on mortgagee within 120 days of filing, where statute of limitations had run on heirs' claims for fraudulent transfer, constructive trust, and declaration of rights.)

Moreover, the entry of a self-executing order of dismissal violated Appellant's due process right to having an opportunity to be heard. The self-executing order of dismissal with prejudice was entered without affording plaintiff opportunity to explain efforts Appellant undertook to obtain service and show good cause why he should be afforded additional time, and deprived Appellant any ability to seek exercise of court's discretion. Instead, the lower court prejudged Appellant and was prevented from offering good cause to establish a basis for a further extension.

In *Albo v. Martell*, No. 3D23-1379, 2024 WL 3433739 (Fla.3rd DCA July 17, 2024), a case almost directly on point, this Court recently reversed a sua sponte dismissal for failure to serve a summons and complaint as required by Florida Rule of Civil Procedure 1.070(j). This Court reversed the dismissal based upon a violation of plaintiff's due process right to notice and opportunity to be heard. This Court explained that the trial court provided no notice or opportunity to be

heard before entering sua sponte the order dismissing plaintiff's action against defendants and stated that without further notice should plaintiff fail to meet deadline, order was entered without affording plaintiff opportunity to explain efforts plaintiff undertook to obtain service and show good cause why she should be afforded additional time, and dismissing action sua sponte deprived plaintiff of any ability to seek exercise of court's discretion.

The same circumstances that existed in *Albo* exist in this case. Here, although the order was not entered sua sponte, it was a self-executing order in that the court dismissed the case without further notice. As such, the order was entered without affording Appellant any opportunity to explain what efforts he undertook to obtain service and show good cause why he should be afforded additional time, and instead dismissed the action while depriving Appellant of any ability to seek exercise of court's discretion. Therefore, this court should reverse the final judgment just as this Court did in *Albo*.

Lastly, any argument that the dismissal was due to the failure to comply with the Court's April 28, 2024 Order would be without merit. This is because the lower court could not impose a self-executing order, and instead would require a *Kozel* hearing. In *Crown Asset Mgmt., LLC*

v. Bribiesca, No. 3D23-2094, 2024 WL 3167486 (Fla.3rd DCA June 26, 2024) this Court held that a trial court was required to make express findings of fact related to each of the factors from *Kozel v. Ostendorf*, before dismissing an action with prejudice against a debtor based upon the plaintiff's failure to serve process on debtor within 45 days under trial court's order. The exact same situation exists here, as the lower court dismissed the case for failure to serve the Argentines within ___ days and then dismissed the case without making any express findings pursuant to *Kozel v. v. Ostendorf*, 629 So. 2d 817 (Fla. 1993).

As such, this Court should reverse the Final Judgment and remand the case to the trial court to conduct a "good cause" hearing.

POINT III

The Final Judgment in favor of the Developers and the Escrow Agent should be reversed since it is void ab initio because it was entered in violation of Appellant's due process right to notice and opportunity to be heard and when there was no order entered dismissing the case against Developers and the Escrow Agent, and where they had filed an answer to the operative complaint.

In *Albo*, supra the Court held that a trial court's dismissal of plaintiff's claims against defendant's former attorney and law firm, as part of trial court's sua sponte order dismissing plaintiff's entire action against attorney and law firm, as well as separate company, company's owner, and owner's wife based on alleged failure to properly serve defendants in accordance with order granting motion to quash service of process filed by company, owner, and wife, was void within meaning of rule governing relief from void orders; there was no basis to dismiss former attorney and law firm, both of whom had been properly served and answered the amended complaint.

The exact same situation that existed in *Albo*, supra exists in the case at bar. In this case, the trial court dismissed the case against the Argentines. The clerk of the court treated the dismissal as applying to the Developers and the Escrow Agent, and closed the entire file. Appellant moved to set aside the dismissal as to the Developers and the Escrow Agent since they had been served and had already answered the

third amended complaint. The motion was denied as was the motion for rehearing.

There is now a Final Judgment dismissing the Developers and Escrow Agent that was entered without cause or any legal basis, and was entered in violation of the Appellant's due process right to notice and opportunity to be heard. Since this case is no different than *Albo*, this Court should reverse the final judgment in this case just as it did in *Albo*.

CONCLUSION

Appellant requests that this Honorable Court reverse the Final Judgment and remand the case to the trial court to try the case against the Developers and the Escrow Agent, and to conduct a hearing to determine whether the Argentines were served, and if not whether there is good cause to extend the time to serve them such other further relief as this Honorable Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.045(b) and (e)

The undersigned hereby certifies that the foregoing Petition complies with Fla.R.App.P. 9.045 in that it was prepared using Bookman Old Style 14-point font and complies with all word count, spacing and margin requirements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished by the Florida Courts eFiling Portal pursuant to Fla. R. Jud. Admin 2.516(b)(1), on November 18, 2024:

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