IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

CHAIM JOSEPH BIALOSTOZKY a/k/a
JOSEPH BIALOSTOZKY a/k/a
YOSEPH BIALOSTOZKY,

Appellant,

CASE NO.: 5D24-0613
LT CASE NO.: 2022-CA-000743

v.

GAHC3 MOUNT DORA FL MOB II, LLC,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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I. INTRODUCTION

For the purposes of this Brief, Appellant, CHAIM JOSEPH BIALOSTOZKY a/k/a JOSEPH BIALOSTOZKY a/k/a YOSEPH BIALOSTOZKY, will be referred to as "Bialostozky." Appellee, GAHC3 MOUNT DORA FL MOB II, LLC will be referred to as "Mount Dora." The designation "A" will refer to the Appendix to this Brief and will be followed by the page number referenced. For example, the designation "A-1" would refer to the first document in the Appendix. Specific page numbers where necessary will be referenced "pg." following the document reference and the line number will follow the page number where references to a transcript are made.

The instant appeal arises from the trial court's denial of Bialostozky's Verified Emergency Motion to Quash Service of Process and Motion to Vacate Clerk's Default (hereinafter the "Emergency Motion"). In denying the Emergency Motion, the trial court improperly refused to quash service of process and vacate the void Clerk's Default without regard for Bialostozky's due process rights. In light of the foregoing, and for the reasons further set forth herein, the trial court committed reversible error.

II. BASIS FOR INVOKING JURISDICTION

Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) permits appeal to the district courts of nonfinal orders entered by lower tribunals which determine "the jurisdiction of the person." Fla. R. App. P. 9.130(a)(3)(C)(i); *see also Vaughn v. Wells Fargo Bank, N.A.*, 153 So. 3d 969, 970 (Fla. 5th DCA 2015); *Re-Employment Services, Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 470 (Fla. 5th DCA 2007); *Fisher v. Int'l Longshoremen's Ass'n*, 827 So. 2d 1096, 1097 (Fla. 1st DCA 2002); *Gaspar, Inc. v. Naples Fed. Sav. & Loan Ass'n*, 546 So. 2d 764, 765 (Fla. 5th DCA 1989). "An order on a motion to quash service of process is one that determines personal jurisdiction and is thus appealable." *Vaughn*, 153 So. 3d at 970 (citing *Re-Employment Services, Ltd.*, 969 So. 2d at 470).

III. STATEMENT OF THE CASE AND FACTS

On or about November 10, 2022, Mount Dora filed its Complaint against Bialostozky for Fraudulent Transfer pursuant to §726.105(1)(a), Fla. Stat. (Count I); for Fraudulent Transfer pursuant to §726.105(1)(b), Fla. Stat. (Count II); and for Fraudulent Transfer pursuant to §726.106(1), Fla. Stat. (Count III). A-1. On or about January 11, 2023, Mount Dora filed its purported Return of Service

which claims that service of process was personally made on Bialostozky at 20 Regal Court, Lakewood, NJ 08701 on November 28, 2022 at 6:24 P.M. A-2.

On January 11, 2023, Mount Dora moved for an *ex parte* clerk's default and, on January 12, 2023, a Clerk's Default was entered against Bialostozky. A-3. Notably, the Motion for Default does not contain a certificate of service. A-3. On October 2, 2023, Mount Dora moved for a default final judgment against Bialostozky. A-4.

On October 9, 2023, Bialostozky received via U.S. Mail a copy of Mount Dora's Motion for Default Final Judgment. A-5 pg. 49 and 84, A-11. On October 20, 2023, a mere eleven (11) days later, Bialostozky filed his Verified Emergency Motion to Quash Service of Process and Motion to Vacate Default. A-5. The Emergency Motion was verified by Bialostozky under penalty of perjury, A-5 pg. 55, and attached verified Declarations of both Bialostozky and non-party witnesses Rabbi Avraham Levin, Jacob Weintraub and Asher Shapira. A-5 pgs. 83-93. The Emergency Motion also had attached copies of Returns of Services executed by the same process server, Jessica Duffy, relating to alleged service of process on Bialostozky from two separate proceedings commenced by Mount Dora against

Bialostozky in Brevard County, Florida and Lake County, Florida wherein service of process was also challenged. A-5 pgs. 71-81. Notably, in the Lake County, Florida lawsuit initiated by Mount Dora against Bialostozky, the trial court there quashed Jessica Duffy's service of process on Bialostozky. A-5 pg. 78-81. The Emergency Motion argues, *inter alia*, that service of process was not effectuated on Bialostozky in the trial court proceedings, that he can satisfy all required elements to vacate a defualt and that the trial court lacked personal jurisdiction over Bialostozky as he does not reside in Florida (he is a resident of the State of New Jersey) and does not engage in substantial business activity in Florida. A-5 pgs. 42-45, 47-49, 83-84, 95-103. Additionally, the Emergency Motion has attached Bialostozky's Motion to Dismiss for Lack of Personal Jurisdiction. A-5 pgs. 95-103.

On January 25, 2024, Mount Dora filed its Response In Opposition to the Emergency Motion, A-6, along with Mount Dora's Request for Judicial Notice of Supplemental Documents In Support of its Response In Opposition, A-7, and Mount Dora's Witness and Exhibit List. A-8. On January 26, 2024, Bialostozky filed his Exhibit List, A-9, and Request for Judicial Notice. A-10. On January 26,

2024, Bialostozky also filed the Declaration of Bialostozky, A-11, the Declaration of Rabbi Avraham Levin, A-12, the Declaration of Jacob Weintraub, A-13, and the Declaration of Asher Shapira. A-14.

The trial court held an evidentiary hearing on February 1, 2024 on Bialostozky's Emergency Motion. A-15. On February 5, 2024, the trial court entered the Order Denying Motions to Quash Service and Order Denying Motions to Vacate Default (Dkt #'s 14 in each case) (hereinafter the "Order"). A-16. The instant appeal ensued.

IV. STANDARD OF REVIEW

An order on a motion to quash service of process is reviewed de novo. *Re–Emp't Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 470 (Fla. 5th DCA 2007) (citing *Nw. Aircraft Capital Corp. v. Stewart*, 842 So. 2d 190, 193 (Fla. 5th DCA 2003) (citing *Wendt v. Horowitz*, 822 So. 2d 1252 (Fla. 2002))).

Similarly, the appellate standard of review for orders determining the jurisdiction of a person is de novo. *Re-Employment Services, Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 470 (Fla. 5th DCA 2007) (citing *Nw. Aircraft Capital Corp. v. Stewart,* 842 So. 2d 190, 193 (Fla. 5th DCA 2003) (citing *Wendt*, 822 So. 2d at 1252)).

Moreover, appellate courts "review de novo the trial court's compliance with the requirements of due process." *Azure-Moore Investments LLC v. Hoyen*, 300 So. 3d 1268, 1270 (Fla. 4th DCA 2020) (citing *VMD Fin. Servs., Inc. v. CB Loan Purchase Assocs., LLC*, 68 So. 3d 997, 999 (Fla. 4th DCA 2011)).

" 'An order denying a motion to vacate a clerk's default is reviewed under an abuse of discretion standard.' " *ACE Funding Source, LLC v. A1 Transp. Network, Inc.*, 314 So. 3d 726, 727 (Fla. 3d DCA 2021) (citing *Makes & Models Magazine, Inc. v. Web Offset Printing Co., Inc.*, 13 So. 3d 178, 181 (Fla. 2d DCA 2009)).

V. SUMMARY OF THE ARGUMENT

The trial court reversibly erred in denying the Emergency Motion and in failing to quash service of process and failing to vacate the void Clerk's Default against Bialostozky. The Clerk's Default entered against Bialostozky is void as: 1) the trial court lacks personal jurisdiction over Bialostozky; 2) Bialostozky acted with due diligence in filing his Emergency Motion and showed excusable neglect and meritorious defenses; 3) Mount Dora moved for a Clerk's Default on an ex-parte basis without notice to Bialostozky; and 4) service of process was not effectuated on Bialostozky in this case.

As a first matter, the trial court erred by not quashing service in the lower court matter as service was not effectuated on Bialostozky as set forth in the Return of Service as he was not at his residence on the date and time of the purported service. Bialostozky presented clear and convincing evidence rebutting the presumption of validity of service of process, including Declarations from himself, from Rabbi Avraham Levin and from Jacob Weintraub and Asher Shapira.

The Clerk's Default entered against Bialostozky is void as the trial court lacks personal jurisdiction over Bialostozky. Mount Dora only asserted one allegation in its Complaint to attempt to invoke the general jurisdiction provision of Florida's long-arm statute and failed to include all together any allegations pertaining to specific jurisdiction. However, such allegation was insufficient to bring this action within the ambit of Florida's long-arm statute as it is vague and conclusory in nature, is unsupported by any allegations of ultimate facts, and as Mount Dora's Complaint fails to either cite to §48.193, Fla. Stat. (2022), or track the language of §48.193(2), Fla. Stat. (2022). Mount Dora also failed to meet its burden of showing

that Bialostozky engaged in substantial and not isolated activity within the State of Florida for due process purposes.

Bialostozky's due process rights were also violated as Mount Dora failed to provide Bialostozky with a copy of its Motion for Default. Bialostozky was entitled to notice of Mount Dora's Motion for Default, Mount Dora was required to notice Bialostozky of its Motion for Default and was not entitled to move for a clerk's default under Florida Rule of Civil Procedure 1.500(a) as Mount Dora knew or should have known that Bialostozky is represented by counsel and that Bialostozky intended to defend against the lower court proceedings on the merits. Notwithstanding, Mount Dora improperly moved for a clerk's default and default final judgment on an ex-parte basis in violation of Bialostozky's due process rights.

As the Clerk's Default is void and Bialostozky was not served with process in the lower court action, Bialostozky was not required to prove each element of excusable neglect, meritorious defense and due diligence typically required to be proven in order to vacate a default. Nevertheless, Bialostozky satisfied each of the said elements and the trial court erred by failing to consider altogether Bialostozky's

meritorious defenses and by failing to find due diligence or excusable neglect.

Lastly, Bialostozky acted with due diligence as he promptly filed his Emergency Motion a mere eleven (11) days after first learning of the lower court proceedings when he received a copy of Mount Dora's Motion for Default Final Judgment. Bialostozky showed excusable neglect as he was not served with process of the lower court proceedings and as he did not receive any of the filings of the lower court proceedings, until first receiving the Motion for Default Final Judgment. Lastly, Bialostozky provided meritorious defenses, which the trial court failed to consider altogether, with his Emergency Motion as he attached thereto his Motion to Dismiss for Lack of Personal Jurisdiction.

Accordingly, for the reasons set forth further herein, the Order must be reversed, service of process quashed and the Clerk's Default against Bialostozky vacated.

VI. ARGUMENT

I. The Trial Court Reversibly Erred In Upholding Service Of Process.

The trial court committed reversible error in denying Bialostozky's Emergency Motion without proper service on Bialostozky. Service was defective in this case as Bialostozky was not present at his residence at the date and time set forth in the Return of Service. *See* A-2; A-5; A-11. Had Bialostozky actually been served, he would have vigorously defended the lower court matter. *See* A-2; A-5; A-11.

"The courts require strict construction of, and compliance with, the provisions of statutes governing service of process." *Re-Employment Services, Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 471 (Fla. 5th DCA 2007) (citing *Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952, 954 (Fla. 2001); *Shepheard v. Deutsche Bank Trust Co. Ams.*, 922 So. 2d 340, 343 (Fla. 5th DCA 2006); *Torres v. Arnco Constr., Inc.*, 867 So. 2d 583 (Fla. 5th DCA 2004); *Pina v. Simon–Pina*, 544 So. 2d 1161, 1162 (Fla. 5th DCA 1989)). "The court cannot proceed in a matter until proper proof of valid service is made." *Id.* (citing *Klosenski v. Flaherty*, 116 So. 2d 767, 768–69 (Fla. 1959)). This is because "the fundamental purpose of service is 'to give proper notice to the defendant in the case that he is answerable to the claim of plaintiff and, therefore, to vest jurisdiction in the court

entertaining the controversy.' " *Shurman v. Atl. Mortg. & Inv. Corp.*, 795 So. 2d 952, 953–54 (Fla. 2001) (citing *State ex rel. Merritt v. Heffernan*, 142 Fla. 496, 195 So. 145, 147 (1940); *Klosenski,* 116 So. 2d at 768). "In other words, the purpose of this jurisdictional scheme is to give the person affected notice of the proceedings and an opportunity to defend his rights." *Id.* at 954.

Pursuant to §48.031(1)(a), Fla. Stat., "[s]ervice 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." "The burden of proving proper service of process falls upon the party invoking the court's jurisdiction … and the return of service is evidence of whether service was validly made." *Shurman*, 795 So. 2d at 953–54 (internal citations omitted). "If the return is regular on its face, then the service of process is presumed to be valid and the party challenging service has the burden of overcoming that presumption by clear and convincing evidence." *Id.* (citing *Klosenski*, 116 So. 2d at 769; *Melchi Dev. Group,*

Inc. v. Berky Dev. Group, L.L.C., 918 So. 2d 407 (Fla. 5th DCA 2006); *Telf Corp. v. Gomez,* 671 So. 2d 818 (Fla. 3d DCA 1996)).

"Clear and convincing evidence is defined as an intermediate burden of proof that: requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. *S. Florida Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872–73 (Fla. 2014) (citing and quoting *Inquiry Concerning a Judge*, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983))). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Id.* (citing and quoting *Inquiry Concerning a Judge*, 645 So. 2d at 404 (quoting *Slomowitz*, 429 So. 2d at 800)).

In the case at bar, Bialostozky rebutted the presumption of validity of service by clear and convincing evidence. In support of the same, Bialostozky filed his Emergency Motion a mere eleven (11) days after first learning of the lower court proceedings. A-5. The Emergency Motion is verified by Bialostozky and has attached to it

the Declaration of Bialostozky, the Declaration of Rabbi Avraham Levin, the Declaration of Jacob Weintraub and the Declaration of Asher Shapira. A-5. The Return of Service states that service of the Summons and Complaint were personally served on Bialostozky on November 28, 2022 at 6:24 P.M. at his residence located at 20 Regal Court, Lakewood, NJ 08701. A-2. However, this is directly contradicted by the verified Emergency Motion and the Declarations of Bialostozky and Rabbi Avraham Levin. A-5; A-11; A-12; A-13; A-14.

Specifically, the Declaration of Bialostozky clearly (without any hesitation or confusion) provides that on the evening of November 28, 2022 between 6:00PM and 9:00PM, Bialostozky was not at his residence located at 20 Regal Court, Lakewood, NJ 08701, but was attending evening prayers at the Zichron Baruch Chasidic Center located at 325 10th Street, Lakewood, NJ together with Rabbi Avraham Levin and others, and that he was not served with any documents on the evening of November 28, 2022. *See* A-5, pgs. 83-84; A-11. This is further corroborated by the clear (again without any hesitation or confusion) Declaration of Rabbi Avraham Levin which provides that on the evening of November 28, 2022, he performed

evening prayers at the Zichron Baruch Chasidic Center located at 325 10th Street, Lakewood, NJ between 6:00PM and 9:00PM and "[a]t all times between 6:00PM and 9:00PM on November 28, 2022, CHAIM JOSEPH BIALOSTOZKY was in my presence and was never served with any type of process or paper." *See* A-5, pgs. 86-87, A-12.

The Declarations of Jacob Weintraub and Asher Shapira further corroborate the Declarations of Bialostozky and of Rabbi Levin as they provide that they both regularly attend evening prayers at the Zichron Baruch Chasidic Center with Bialostozky; that on the evening of November 28, 2022, they attended evening prayers at the Zichron Baruch Chasidic Center with Bialostozky from 6:00PM to 9:00PM; and that "[a]t all times between 6:00PM and 9:00PM on November 28, 2022, CHAIM JOSEPH BIALOSTOZKY was in my presence and was never served with any type of process or paper." *See* A-5 pgs. 89-93, A-13; A-14. Thus, contrary to the allegations of the Return of Service which purports that Bialostozky was served on November 28, 2022 at 6:24 P.M. at his residence, Bialostozky presented clear and convincing evidence directly contradicting the same and sufficiently met his burden to rebut the purported service of process on him. Counsel for Bialostozky also advised the trial court

that they remained ready, willing and able at all relevant times to accept service of process on Bialostozky's behalf. For the foregoing reasons, the trial court erred in denying the Emergency Motion and in failing to quash service of process and vacate the Clerk's Default. This Court should follow the well-established policy in this state which prefers an adjudication on the merits as opposed to adjudications following defaults. *See Cedar Mountain Estates, LLC*, 4 So. 3d at 17.

II. The Trial Court Reversibly Erred In Failing To Vacate The Void Clerk's Default Against Bialostozky.[1]

Florida courts have a policy of liberality toward vacating defaults and allowing trial on the merits. *See Cedar Mountain Estates, LLC v. Loan One, LLC*, 4 So. 3d 15, 17 (Fla. 5th DCA 2009); *Conidaris v. Credit Alliance Corp.*, 558 So. 2d 523, 525 (Fla. 5th DCA 1990); *Tutwiler Cadillac, Inc. v. Brockett*, 551 So. 2d 1270, 1271 (Fla. 1st DCA 1989). Where there is any reasonable doubt in the matter of vacating a default, it should be resolved in favor of granting the application and allowing a determination upon the merits rather than

[1] The trial court's ruling as to quashing service of process is intertwined with matters pertaining to the vacating of the Clerk's Default. *See* A-16.

upon procedural technicalities. *See Tutwiler Cadillac, Inc.*, 551 So. 2d at 1272; *see also Zimmerman v. Vinylgrain Indus. Of Jacksonville, Inc.*, 464 So. 2d 1353, 1354 (Fla. 1st DCA 1985) ("The Florida Supreme Court has established a policy of providing relief from defaults and allowing trials on the merits. If there is any reasonable doubt in the matter of vacating a default, it should be resolved in favor of granting the application and allowing the trial upon the merits."). The Supreme Court of Florida has also repeatedly made clear that "'[t]he true purpose of the entry of a default is to speed the cause … [i]t is not procedure intended to furnish an advantage to the plaintiff so that a defense may be defeated, or a judgment reached without the difficulty that arises from a contest by the defendant." *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 853 (Fla. 1962) (internal citation omitted). Notwithstanding, this is exactly what Mount Dora is attempting to do in this case—use an improperly obtained procedural advantage over Bialostozky so as to quickly obtain a void default (and thereafter a default final judgment) without giving Bialostozky the opportunity to contest the merits of Mount Dora's claims. This goes against the aforementioned well-established public policy of this state and should not be permitted.

In the instant matter, the trial court committed reversible error when it denied the Emergency Motion and declined to vacate the Clerk's Default as such Default was void because: 1) the trial court lacks personal jurisdiction over Bialostozky; 2) Mount Dora violated Bialostozky's due process rights by seeking an ex parte default under Florida Rule of Civil Procedure 1.500(a) notwithstanding that they knew that Bialostozky had counsel and intended to defend on the merits; and 3) the trial court failed to consider altogether Bialostozky's meritorious defenses and erroneously found lack of due diligence and excusable neglect. Accordingly, reversal of the Order is warranted along with the vacating of the void Clerk's Default.

A. The Trial Court Lacks Personal Jurisdiction Over Bialostozky.

As a first matter, the Clerk's Default is void as the trial court lacks personal jurisdiction over Bialostozky. Notwithstanding that the trial court's lack of personal jurisdiction over Bialostozky was raised as part of Bialostozky's Emergency Motion, the trial court's Order did not address this. As set forth further below, Mount Dora's Complaint failed to sufficiently invoke Florida's long-arm statute and Bialostozky lacks the requisite minimum contacts with the State of

Florida. Accordingly, the Clerk's Default is void for lack of personal jurisdiction over Bialostozky, the Order must be reversed, the default vacated and the alleged long-arm service of process on Bialostozky quashed. *See Intercarga Internacional De Carga, S.A. v. Harper Group, Inc.*, 659 So. 2d 1208, 1210 (Fla. 3d DCA 1995) (citing *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989) ("Finding appellees failed to set forth sufficient allegations to show how Intercarga and Ruiz were subject to the jurisdiction of a Florida court under sections 48.181 and 48.193 Florida Statutes (1993), the order under review is reversed … [w]ithout jurisdiction over these defendants, the default is void … [t]he amended complaint is dismissed, the long-arm service of process is quashed, and the default is vacated."); *Cohen v. Drucker*, 677 So. 2d 953, 954 (Fla. 4th DCA 1996).

In the case at bar, Mount Dora's Complaint only sought to have the trial court exercise general jurisdiction. and it is undisputed that Mount Dora did not seek to have the trial court exercise specific personal jurisdiction over Bialostozky. *See* A-1. The sole jurisdictional allegation made by Mount Dora in its Complaint is as follows: "[j]urisdiction is appropriate in Flagler County, Florida as

Defendant engages in continuous and systematic real estate transactions in Florida, including the transaction at issue below, such that Defendant has assented to the jurisdiction of Florida." *See* A-1, pg. 6. Such conclusory allegation is insufficient to bring this action within the ambit of Florida's long-arm statute. As such allegation is insufficient to invoke Florida's long-arm statute, this Court need not address whether the trial court's exercise of personal jurisdiction over Bialostozky would comport with the requirements of due process. Undertaking the constitutional analysis also reveals that the trial court cannot properly exercise jurisdiction over Bialostozky as doing so results in a violation of his right to due process. Yet, that is effectively what the trial court has done by allowing Mount Dora to proceed under a void Clerk's Default.

"[I]n order to subject a defendant to an in personam judgment when he is not present within the territory of the forum, due process requires that the defendant have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "[T]he test is

whether the defendant's conduct in connection with the forum state is 'such that he should reasonably anticipate being hauled into court there.' " *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980)).

"Personal jurisdiction can exist in two forms: "specific," in which the alleged activities or actions of the defendant are directly connected to the forum state, and "general," in which the defendant's connection with the forum state is so substantial that no specific or enumerated relationship between the alleged wrongful actions and the state is necessary." *Caiazzo v. Am. Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

"In determining whether long-arm jurisdiction is appropriate in a given case, two inquiries must be made." *See Venetian Salami Co.*, 554 So. 2d at 502 (citing *Unger v. Publisher Entry Service, Inc.*, 513 So. 2d 674, 675 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988)). "First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient 'minimum contacts' are demonstrated to satisfy due process requirements." *Id.* (citing *Unger*, 513 So. 2d at 675). "Thus, under a

given factual situation, even though a nonresident may appear to fall within the wording of a long arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state." *Id.* at 502 (citing *Harlo Products Corp. v. Case Co.*, 360 So. 2d 1328 (Fla. 1st DCA 1978); *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So. 2d 130 (Fla. 1st DCA 1977)). However, "[i]f Florida's long-arm statute does not provide a basis for personal jurisdiction under the initial statutory prong of this inquiry, the constitutional analysis is unnecessary." *Parisi v. Kingston*, 314 So. 3d 656, 660 (Fla. 3d DCA 2021) (citing *Homeway Furniture Co. of Mount Airy, Inc. v. Horne*, 822 So. 2d 533, 536 (Fla. 2d DCA 2002)).

i. Mount Dora's Complaint Failed to Allege Sufficient Facts To Invoke Florida's Long-Arm Statute.

The Plaintiff bears the burden of alleging, and ultimately proving, facts sufficient to establish long-arm jurisdiction under Section 48.193, Florida Statutes. *See, e.g., QSR, Inc. v. Concord Food Festival Inc.*, 766 So. 2d 271, 274 (Fla. 4th DCA 2000). If the plaintiff meets the initial burden of pleading a prima facie basis for personal jurisdiction, then the burden shifts to the defendant to produce

evidence tending to refute the initial allegations of jurisdiction. *See id.*; *Venetian Salami*, 554 So. 2d at 502. Upon the production of such evidence, the burden shifts back to plaintiff to prove the basis upon which it has alleged personal jurisdiction may be exercised. *See id.* Here, Mount Dora wholly failed to meet its initial burden. *See* A-1.

Florida's long arm jurisdiction statute, section 48.193(2), Fla. Stat. (2022), provides in relevant part as follows:

> A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

"Florida's long-arm statute addresses both specific and general jurisdiction." *Id.* Section 48.193(1), Fla. Stat. (2022), addresses specific jurisdiction in Florida, whereas section 48.193(2), Fla. Stat. (2022), addresses general jurisdiction. *Id.* Courts are to construe the long-arm statute strictly. *See Seabra v. International Specialty Imports, Inc.*, 869 So. 2d 732, 733 (Fla. 4th DCA 2004); *W.C.T.U. Ry. Co. v. Szilagyi*, 511 So. 2d 727, 728 (Fla. 3d DCA 1987) ("At the outset we observe that under Florida law the long-arm statute is to be strictly construed.").

Here, Mount Dora's Complaint fails to allege sufficient ultimate facts to establish specific and/or general jurisdiction over Bialostozky pursuant to Florida's long-arm statute, §48.193, Fla. Stat. (2022). *See* A-1. Mount Dora's Complaint clearly does not seek to establish specific jurisdiction over Bialostozky[2] as Mount Dora undoubtedly knows that it would be unable to support such basis. *See Edwards v. Airline Support Group, Inc.*, 138 So. 3d 1209, 1211–12 (Fla. 4th DCA 2014) (citing *Dinn v. Haynes*, 705 So. 2d 686, 687 n. 1 (Fla. 4th DCA 1998)) (stating that the Third and Fifth District Courts of Appeal and "the majority of courts nationwide have found a fraudulent transfer does not constitute a tortious act for purposes of Florida's long-arm statute."). In support of the trial court's jurisdiction over Bialostozky, Mount Dora's Complaint only makes one allegation, to wit: "[j]urisdiction is appropriate in Flagler County, Florida as Defendant engages in continuous and systematic real estate transactions in Florida, including the transaction at issue below, such that Defendant has assented to the jurisdiction of Florida." *See* A-1, pg. 6. Such allegation is wholly insufficient to bring this action

[2] Mount Dora's Complaint contains no allegations to invoke Section 48.193(1), Fla. Stat. (2022). *See* A-1.

within the ambit of §48.193(2), Fla. Stat. (2022), as it is vague and conclusory in nature, is unsupported by any allegations of ultimate facts, and as Mount Dora's Complaint fails to either cite to §48.193, Fla. Stat. (2022), or track the language of §48.193(2), Fla. Stat. (2022). *See Parisi v. Kingston*, 314 So. 3d 656, 663 (Fla. 3d DCA 2021) (finding plaintiff failed to plead a legally sufficient basis for extending long-arm jurisdiction where allegations of complaint were conclusory and vague in nature, lacking in ultimate facts supporting such allegations and as the complaint neither cited to section 48.193, Fla. Stat. or tracked the language of the said statute); *see also Russo v. Fink*, 87 So. 3d 815, 817 (Fla. 4th DCA 2012) (finding that the complaint failed to allege sufficient facts to bring the action within Florida's long-arm statute and that dismissal was proper under first prong of personal jurisdiction analysis); *Res. Healthcare of Am., Inc. v. McKinney*, 940 So. 2d 1139, 1143 (Fla. 2d DCA 2006) (finding plaintiff failed to establish long-arm jurisdiction under both specific and general jurisdiction provisions of section 48.193, Fla. Stat.).

In light of the foregoing, Plaintiff's Complaint wholly fails to allege sufficient jurisdictional facts to bring the action within the ambit of the long-arm statute and the trial court reversibly erred in

denying the Emergency Motion, vacating the default and quashing service of process as it lacks both general and specific jurisdiction over Bialostozky. *See Venetian Salami Co.*, 554 So. 2d at 502 (Fla. 1989).

ii. The Trial Court's Exercise of Jurisdiction Over Bialostozky Fails to Comport with the Requirements of Due Process.

While Mount Dora's Complaint fails to bring this action under the ambit of Florida's long-arm statute thereby rendering the second prong of the *Venetian Salami Co.* test unnecessary, *see Parisi*, 314 So. 3d at 660 (internal citation omitted), even assuming *arguendo* that Mount Dora sufficiently pled a basis in its Complaint to bring this action under the ambit of long-arm statute (it did not), Bialostozky lacks the requisite minimum contacts such that the trial court's exercise of personal jurisdiction over him fails to comport with the requirements of due process.

The second part of the *Venetian Salami Co.* test is "whether the defendant's conduct in connection with the forum state is 'such that he should reasonably anticipate being hauled into court there.' " *Venetian Salami Co.*, 554 So. 2d at 500 (citing and quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62

L.Ed.2d 490 (1980)). "In order to so find, the defendant must have purposefully availed itself of the privilege of conducting some type of activity within Florida, thus invoking its benefits and protections." *Viking Acoustical Corp. v. Monco Sales Corp.*, 767 So. 2d 632, 633–34 (Fla. 5th DCA 2000) (citing *Hanson v. Denckla,* 357 U.S. 235 (1958)). " 'These minimum contacts must exist so as to satisfy the 'traditional notions of fair play and substantial justice.' " *Id.* (citing and quoting *Grogan v. Archer*, 669 So. 2d 289, 292 (Fla. 5th DCA 1996) (internal citations omitted).

As set forth hereinabove, the only allegation of Mount Dora's Complaint upon which it relies to invoke Florida's long-arm statute, albeit insufficiently pled, pertains only to general jurisdiction and not specific jurisdiction. *See* A-1 pg. 6. Thus, Mount Dora had the burden of showing that Bialostozky engaged in <u>substantial and not isolated activity</u> within this state and that he had sufficient minimum contacts such that Bialostozky could reasonably anticipate being hauled into court in Flagler County, Florida. *See* 48.193, Fla. Stat. (2022); *and see Venetian Salami Co.*, 554 So. 2d at 500. Mount Dora failed to meet this burden.

In response to the jurisdictional allegation of Mount Dora's Complaint, Bialostozky filed his verified Emergency Motion which has attached Bialostozky's Motion to Dismiss for Lack of Personal Jurisdiction which provides in relevant part: that Bialostozky is a resident of the State of New Jersey *see* A-5 pg. 95; that even if Bialostozky came into possession of the funds at issue in Mount Dora's Complaint (which Bialostozky denies), then Bialostozky would not have come into possession of such funds in Florida; and that any transfer of money as alleged in the Complaint would have occurred in New Jersey as Bialostozky resides in New Jersey and as Riverside Abstract is located in New Jersey. *See* A-5 pg. 96.

Mount Dora presented no evidence to rebut Bialostozky's Emergency Motion as to Bialostozky's jurisdictional claims notwithstanding that they had the burden to do so in light of the Motion to Dismiss for Lack of Personal Jurisdiction. *See* A-5 pgs. 95-103, A-6. As such, Mount Dora failed to demonstrate that Bialostozky, individually, has sufficient "minimum contacts" (which are substantial and not isolated) with the State of Florida. Accordingly, the trial court's exercise of personal jurisdiction over Bialostozky constitutes reversal error and is clearly a violation of his

due process rights. Accordingly, the Court should reverse the Order, vacate the Clerk's Default and quash service of process.

B. Mount Dora Improperly Sought an Ex-Parte Clerk's Default Against Bialostozky Pursuant Fla. R. Civ. P. 1.500(a).

Mount Dora was required to provide notice to Bialostozky of its Motion for Default and was not permitted to move for a default under Florida Rule of Civil Procedure 1.500(a) as Mount Dora knew or should have known that Bialostozky is represented by counsel and that he intended to defend the lower court proceedings on the merits. *See* A-5, A-6. Notwithstanding, Mount Dora filed an *ex-parte* Motion for Default pursuant to Fla. R. Civ. P. 1.500(a) which did not contain a certificate of service and was not served on Bialostozky. *See* A-3. This was a violation of Bialostozky's due process rights, thereby warranting the setting aside of the invalid Clerk's Default.

Florida Rule of Civil Procedure 1.500(a) permits entry by the clerk of a default "[w]hen a party against whom affirmative relief is sought has failed to file or serve any document in the action" whereas Fla. R. Civ. P. 1.500(b) permits entry by the trial court "[w]hen a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute

or any order of court, the court may enter a default against such party; provided that if such party has filed or served any document in the action, that party must be served with notice of the application for default." *See* Fla. R. Civ. P. 1.500. Rule 1.500 "should be liberally construed in favor of deciding cases on the merits." *Makes & Models Magazine, Inc. v. Web Offset Printing Co., Inc.*, 13 So. 3d 178, 181 (Fla. 2d DCA 2009) (citing *U.S. Bank Nat'l Ass'n v. Lloyd,* 981 So. 2d 633, 639-640 (Fla. 2d DCA 2008); *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. McWilliams,* 799 So. 2d 378, 380 (Fla. 4th DCA 2001))." "Furthermore, a default is not designed to give a strategic advantage to the plaintiff so that it may obtain a judgment without dealing with the defendant's challenges and defenses." *Id.* (citing *Ole, Inc. v. Yariv,* 566 So. 2d 812, 814–15 (Fla. 3d DCA 1990)).

While notice is generally not required prior to entry of a clerk's default when a defendant has not filed or served any paper in an action, there is an exception to this—when the plaintiff is aware that the defendant is represented by counsel and intends to defend on the merits, Fla. R. Civ. P. 1.500(b) requires the plaintiff to serve the defendant with notice of the application for default even though no paper has been filed or served. *See Makes & Models Magazine, Inc.*,

13 So. 3d at 181-182; *Lloyd*, 981 So. 2d at 640 (citing *McWilliams,* 799 So. 2d at 380 (citing *Ole, Inc. v. Yariv ex rel. Yariv,* 566 So. 2d 812, 814 (Fla. 3d DCA 1990))); *JP Morgan Chase Bank, N.A. v. Wells Fargo Bank, N.A.*, 103 So. 3d 282, 283 (Fla. 5th DCA 2012) (internal citations omitted); *Gulf Maint. & Supply, Inc. v. Barnett Bank of Tallahassee,* 543 So. 2d 813, 817 (Fla. 1st DCA 1989); *Rapid Credit Corp. v. Sunset Park Centre, Ltd.,* 566 So. 2d 810, 811 (Fla. 3d DCA 1990); *M.W. v. SPCP Group V, LLC*, 163 So. 3d 518, 520 (Fla. 3d DCA 2015) (internal citation omitted); *Apple Premium Finance Service Co. v. Teachers Insurance & Annuity Association of America,* 727 So. 2d 1089 (Fla. 3d DCA 1999). When there are circumstances where the exception applies, "[a] clerk's default entered in accordance with Fla. R. Civ. P. 1.500(a) under these circumstances is invalid and renders a resulting judgment void." *Lloyd*, 981 So. 2d at 640 (citing *Gulf Maint. & Supply, Inc.*, 543 So. 2d at 817).

In the instant case, Mount Dora was required to provide notice to Bialostozky of its intent to move for a clerk's default as Mount Dora knew or should have known that Bialostozky has counsel and that he intended to defend the instant lawsuit on the merits. *See, e.g.*, *Makes & Models Magazine, Inc.*, 13 So. 3d at 181-182. As set forth in

the Emergency Motion, the lower court proceeding is merely one of numerous lawsuits that Mount Dora has commenced against Bialostozky individually and/or against entities associated with him throughout the State of Florida for the same causes of action (purported fraudulent transfers), and all of which are commenced in an effort to collect on the final judgment that Mount Dora holds against non-parties Hobart Investments, LLC and Timothy F. Majors. *See* A-1; A-5 pgs. 44-45, 52-54; *see also* A-1, A-6, A-7, A-10. As Mount Dora is well aware, in each of the said other lawsuits, such as those commenced by it in Lake County, Florida and Orange County, Florida, Bialostozky and each of the entities of which is a manager and/or member were represented by counsel with the law firm of Freedman Norman Friedland LLP and he has defended each of the said lawsuits. *See* A-1; A-5 pgs. 44-45, 52-54, 71-84; A-6 pgs. 106-107, 116-118; A-7; A-10. As such, Mount Dora knew or should have known that, had Bialostozky been provided with the requisite notice of this case, he would have defended this case (as has been done in the other lawsuits commenced by Mount Dora). Notwithstanding, Mount Dora failed to provide Bialostozky with notice of its intent to move for a clerk's default. *See* A-3. Rather, Mount Dora's Motion for

Default is devoid of a certificate of service altogether and was filed ex parte. A-3. Accordingly, this case is a clear example of a plaintiff looking to obtain a strategic advantage over a defendant so that it may obtain a judgment without dealing with the defendant's challenges and defenses, and in flagrant violation of the defendant's due process rights, which is **not** what a default is designed to do. *See Makes & Models Magazine, Inc.*, 13 So. 3d at 181 (citing *Ole, Inc. v. Yariv,* 566 So. 2d 812, 814–15 (Fla. 3d DCA 1990)).

Mount Dora also inappropriately moved for a clerk's default pursuant to Fla. R. Civ. P. 1.500(a), *see* A-3, notwithstanding that, as Mount Dora knew and/or should have known, Bialostozky is represented by counsel and intended to defend the instant lawsuit on the merits as set forth hereinabove. *See* A-1; A-5 pgs. 44-45, 52-54, 71-84; A-6 pgs. 106-107, 116-118; A-7; A-10. Accordingly, Mount Dora's failure to notice Bialostozky of its Motion for Default and as Mount Dora improperly moved for a clerk's default pursuant to Fla. R. Civ. P.1.500(a) under the circumstances, the Clerk's Default entered against Bialostozky is invalid and should have been vacated. *See Lloyd*, 981 So. 2d at 640 (citing *Gulf Maint. & Supply, Inc.*, 543 So. 2d at 817).

The trial court also erroneously misconstrued the above-stated exception to the general rule regarding the notice requirement for clerk's defaults under Fla. R. Civ. P.1.500(a) by appearing to require a defendant to have to provide evidence as to his relationship with his attorney and whether the defendant's attorney was willing to accept service on Defendant's behalf. Specifically, the Order provides in relevant part that Bialostozky "testified in vague terms about his relationship with that attorney and clarified the representation stating that when he needs something he calls her and she 'helps him' and 'will do work for him' " and that "Defendant failed to establish the then existing representation or whether the attorney announced a willingness to accept service on the Defendant's behalf." *See* A-16 pgs. 227-228.

These additional requirements which the trial court appears to have imposed on Bialostozky in connection with the above-stated exception are not supported by the applicable case law. Rather, the exception is premised on a *plaintiff's knowledge that a given defendant is represented by counsel who has expressed an intention to defend on the merits*. On this point, the First District Court of Appeal aptly stated as follows:

> **[D]efault is not appropriate in cases where the plaintiff knows that a defendant is represented by counsel who intends to assert matters in defense of the cause of action.** The default rule has been liberally construed in Florida to allow trial upon the merits where all parties appear rather than to encourage resolution of legal disputes by default. *EGF Tampa Associates v. Edgar V. Bohlen,* 532 So.2d 1318 (Fla. 2d DCA 1988); *Reicheinbach v. Southeast Bank, N.A.,* 462 So.2d 611 (Fla. 3d DCA 1985); *See* H. Trawick, *Florida Practice and Procedure,* § 25–2 (1985).
>
> It follows that notice of an application for default **should always be served** when the plaintiff is aware that a defendant is being represented by counsel who has expressed an intention to defend on the merits. A default is a procedural matter within the control of the attorney, so **plaintiff's counsel should contact the attorney known to be representing a defendant to determine whether the latter intends to proceed in the matter before causing a default to be entered**. *See* H. Trawick, § 25–3.

See Gulf Maint. & Supply, Inc. v. Barnett Bank of Tallahassee, 543 So. 2d 813, 816 (Fla. 1st DCA 1989) (emphasis added). The First District Court of Appeal went on to further provide:

> Additionally, we note that the Code of Trial Conduct adopted by the American College of Trial Lawyers prescribes: "When [a lawyer] knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal

> to be entered without first inquiring about the opposing lawyer's intention to proceed."

Id. Subsequent to the *Gulf Maint. & Supply, Inc.* case, this Court also went on to explain the exception as follows:

> In *Lloyd* this court held that "[a] trial court should vacate an ex parte default when 'the plaintiff seeking default had actual knowledge that the defendant was represented by counsel and intended to defend the lawsuit, but failed to contact the defendant's counsel prior to seeking default.' " *Lloyd,* 981 So.2d at 640 (quoting *Nat'l Union Fire Ins. Co.,* 799 So.2d at 380). If the plaintiff is aware that the defendant is represented by counsel and intends to defend the litigation on the merits, **it is required to serve the defendant with notice of the application for default and to present the matter to the court for entry of the default**. *Id.* While we recognize that the circuit court did not have the benefit of the *Lloyd* opinion when it entered its order, the principles at issue predate *Lloyd. See, e.g., Ole, Inc.,* 566 So.2d at 814; *Gulf Maint. & Supply, Inc. v. Barnett Bank of Tallahassee,* 543 So.2d 813, 816 (Fla. 1st DCA 1989) ("A default is a procedural matter within the control of the attorney, so plaintiff's counsel should contact the attorney known to be representing a defendant to determine whether the latter intends to proceed in the matter before causing a default to be entered."). **A default that does not comply with this requirement "must be vacated without regard to whether the defendant can establish a meritorious defense or whether the defendant can demonstrate**

> **inadvertence or excusable neglect."** *Lloyd,* 981 So.2d at 640.

See Makes & Models Magazine, Inc. v. Web Offset Printing Co., Inc., 13 So. 3d 178, 181 (Fla. 2d DCA 2009) (emphasis added).

In light of the foregoing, Bialostozky was not required to prove, as the trial court suggests, all matters pertaining to his relationship with his attorney or whether his attorney was willing to accept service on his behalf. Rather, as Mount Dora knew or should have known that Bialostozky was represented by counsel and intended to defend the merits of the instant lawsuit as he had done on the other lawsuits filed against him premised on the exact same causes of action (all of which were commenced by the same attorneys on the same underlying set of facts – to collect on an outstanding judgment owed by third-party judgment debtors), Mount Dora was required to first contact Bialostozky's attorneys and serve them with notice of its intent to move for a default. *See* A-1; A-5 pgs. 44-45, 52-54, 71-84; A-6 pgs. 106-107, 116-118, ; A-7; A-10. Mount Dora's failure to do so violated Bialostozky's right to due process and thereby renders the Clerk's Default invalid and void. For the foregoing reasons, reversal

of the Order is warranted along with the vacating of the Clerk's Default.

C. The Trial Court Failed to Consider Bialostozky's Meritorious Defense and Erred In Finding Lack of Due Diligence and Excusable Neglect.

"Ordinarily, if the trial court enters a default judgment for failure to file responsive pleadings, and the defendant seeks to set it aside … the trial court must determine: '(1) whether the defendant has demonstrated excusable neglect in failing to respond[;] (2) whether the defendant has demonstrated a meritorious defense; and (3) whether the defendant, subsequent to learning of the default, has demonstrated due diligence in seeking relief.' " *Mullne v. Sea-Tech Const. Inc.*, 84 So. 3d 1247, 1249 (Fla. 4th DCA 2012) (citing and quoting *Halpern v. Houser,* 949 So. 2d 1155, 1157 (Fla. 4th DCA 2007)). "However, if the default judgment is *void,* the appellant does not need to establish these elements." *Id.* (citing *Green Solutions Int'l, Inc. v. Gilligan*, 807 So. 2d 693, 696 (Fla. 5th DCA 2002)) (emphasis in original).

Here, it is Bialostozky's position that he was not required to prove the three elements of excusable neglect, meritorious defense and due diligence as the Clerk's Default entered against Bialostozky

was void for the reasons set forth further herein. Notwithstanding, Bialostozky meets each of the said elements as he: 1) promptly moved to vacate the Clerk's Default upon first learning of the lower court proceedings when he received via U.S. Mail the Mount Dora's Motion for Default Final Judgment, 2) as he attached his Motion to Dismiss for Lack of Personal Jurisdiction to his Emergency Motion, which was also verified; and 3) as he was not served with process nor did he receive any of the filings of the lower court proceeding, except for Mount Dora's Motion for Default Final Judgment. While the trial court erroneously found that Bialostozky did not meet the elements of excusable neglect and due diligence, the trial court failed to consider altogether Bialostozky's meritorious defenses (i.e. lack of personal jurisdiction). As such, the trial court reversibly erred in denying the Emergency Motion and in not vacating the Clerk's Default.

i. *Bialostozky Asserted Meritorious Defenses.*

A meritorious defense "must be asserted either by a pleading or in an affidavit, and a general denial is insufficient to demonstrate the existence of a meritorious defense." *Geer v. Jacobsen*, 880 So. 2d 717, 721 (Fla. 2d DCA 2004) (citing *Schauer v. Coleman*, 639 So. 2d 637,

639 (Fla. 2d DCA 1994)). "If a defendant is relying on a *factual* defense to obtain relief from a default judgment, the ultimate facts establishing the defense must be set forth in a verified answer, sworn motion, or affidavit, or by other competent evidence." *Id.* (citing *Westinghouse Elevator Co., A Div. of Westinghouse Elec. Corp. v. DFS Constr. Co.*, 438 So. 2d 125, 126–27 (Fla. 2d DCA 1983)). "While an unverified pleading may be sufficient to establish a *legal* defense to support relief from a default judgment, the movant must 'show legal grounds constituting said meritorious defense.' " *Id.* (citing and quoting *Westinghouse*, 438 So. 2d at 126).

Here, the record clearly reflects that Bialostozky satisfied the meritorious defense element. *See* A-5. Bialostozky's Emergency Motion was verified, had attached to it the Declarations of Bialostozky, Rabbi Avraham Levin, Jacob Weintraub and Asher Shapira as Exhibits "H" though "K," and attached to Bialostozky's Emergency Motion as Exhibit "L" was Bialostozky's Motion to Dismiss For Lack of Personal Jurisdiction. A-5. Accordingly, Bialostozky has more than sufficiently satisfied the element of meritorious defense. *See, e.g., FI Capital Inv. 19, LLC v. S. Florida Title Associates, LLC*, 353 So. 3d 657, 661 (Fla. 4th DCA 2023) (finding motion to dismiss

and five affirmative defenses to satisfy meritorious defense element); *Marshall Davis, Inc. v. Incapco, Inc.*, 558 So. 2d 206, 207 (Fla. 2d DCA 1990) (finding motion to dismiss satisfied meritorious defense element).

Notwithstanding that Bialostozky clearly satisfied the meritorious defenses element, the Order on appeal reveals that the trial court failed to consider the lack of personal jurisdiction altogether. This was reversible error as the trial court was obligated to consider all three elements of due diligence, excusable neglect and the meritorious defenses in ruling on Bialostozky's Emergency Motion.

ii. Bialostozky Acted With Due Diligence.

"Due diligence, which is a test of reasonableness, must be evaluated based on the facts of the particular case … [d]ue diligence must be established with evidence, which includes a sworn affidavit." *Elliott v. Aurora Loan Services, LLC*, 31 So. 3d 304, 308 (Fla. 4th DCA 2010) (internal citations omitted). A defendant is said to have acted with due diligence if a defendant promptly moves to set aside the default after first learning of the default. *See Acceleration Nat. Ins. Co. v. Simmons*, 769 So. 2d 1146, 1147 (Fla. 5th DCA 2000); *Pierce Hardy*

Ltd. P'ship v. Harrison Bros. Contracting, LLC, 13 So. 3d 175, 178 (Fla. 5th DCA 2009) (citing *Gables Club Marina, LLC v. Gables Condo. & Club Ass'n, Inc.*, 948 So. 2d 21, 25 (Fla. 3d DCA 2006)).

Here, the trial court erroneously found that Bialostozky failed to show due diligence based on its determination that "[a]lmost a year went past without action after being duly served." However, this finding misconstrues the due diligence element altogether. Due diligence is instead determined by looking at the amount of time between the discovery of the default and the filing of a motion to vacate that default. *See Simmons*, 769 So. 2d at 1147; *Pierce Hardy Ltd. P'ship*, 13 So. 3d at 178 (citing *Gables Club Marina, LLC*, 948 So. 2d at 25); *Elliott v. Aurora Loan Services, LLC*, 31 So. 3d 304, 308 (Fla. 4th DCA 2010). As the Order indicates, the trial court failed to consider altogether the time period between when Bialostozky first learned of the default and when he moved to vacate the default. This was error.

Contrary to the trial court's finding of no due diligence, the record reveals that Bialostozky first learned of the trial court proceedings and of the default against him when he received Mount Dora's Motion for Default Final Judgment in the mail on October 9,

2023, A-5 pg. 49, and that Bialostozky filed his Emergency Motion on October 20, 2023, a mere eleven (11) days later. *See* A-5. As such, Bialostozky acted with due diligence in moving to vacate the Clerk's Default after first discovering the default, and the trial court reversibly erred by finding otherwise. *See Marshall Davis, Inc. v. Incapco, Inc.*, 558 So. 2d 206, 207 (Fla. 2d DCA 1990) (finding due diligence where filing was made fifteen (15) days later); *Howard v. Gualt*, 259 So. 3d 119, 123 (Fla. 4th DCA 2018) (holding that by moving to vacate a default nineteen (19) days after learning of the suit, the defendant "acted with due diligence to set aside the default"); *Wright v. Regions Bank*, 360 So. 3d 427, 429 (Fla. 4th DCA 2023) (finding due diligence where motion to vacate was filed nineteen (19) days after entry of default).

iii. *Bialostozky Showed Excusable Neglect.*

"Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir.' " *Bowers v. Allez*, 165 So. 3d 710, 711 (Fla. 4th DCA 2015) (citing *Elliott v. Aurora Loan Servs., LLC*, 31 So. 3d 304, 307 (Fla. 4th DCA 2010) (quoting *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106

(Fla. 4th DCA 1985))). It is well established that lack of notice constitutes sufficient grounds for a finding of excusable neglect.[3] *See Gibson v. Buice*, 381 So. 2d 349, 350 (Fla. 5th DCA 1980) (finding excusable neglect where there was lack of notice of rendition of final judgment); *Decubellis v. Ritchotte*, 730 So. 2d 723, 727 (Fla. 5th DCA 1999) (finding excusable neglect where appellants failed to receive notice of the proceedings, either by service of process or otherwise); *see also Taylor v. Bowles*, 570 So. 2d 1093, 1093 (Fla. 4th DCA 1990) (reversing the denial of the defendant's motion for relief from final judgment where, after counsel's withdrawal, mail regarding the case was sent to the defendant's old office address and he never received notice of the pending trial); *Am.'s Yate de Costa Rica v. Armco Mfg., Inc.*, 82 So. 3d 882, 885 (Fla. 4th DCA 2011).

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[3] It is also worth noting the lesser standard required for vacating an interlocutory clerk's default as opposed to vacating a default final judgment. *See Rodriguez v. Falcones*, 314 So. 3d 469, 472 (Fla. 3d DCA 2020) (citing *Gibson Tr., Inc. v. Office of the Atty. Gen.*, 883 So. 2d 379, 383 (Fla. 4th DCA 2004) ("Where a default judgment has been entered, mere conclusory assertions or general denials are insufficient without sufficient allegations of supporting ultimate fact); *Mathews Corp. v. Green's Pool Serv.*, 584 So. 2d 1006, 1007 (Fla. 3d DCA 1990)); *see also Moore v. Powell,* 480 So. 2d 137, 138 (Fla. 4th DCA 1985); *Westinghouse Elevator Co. v. DFS Constr. Co.,* 438 So. 2d 125, 127 (Fla. 2d DCA 1983). This lesser standard is applicable here.

As the record reflects, Bialostozky has established excusable neglect as he was never served with process as set forth further hereinbelow, *see* A-5, and as he never received notice of any of the documents filed by Mount Dora in the lower court proceedings, until he received Mount Dora's Motion for Default Final Judgment on October 9, 2023. *See* A-3, A-4, A-5.

Bialostozky satisfied excusable neglect as he was not served with process and had no notice of the instant proceedings until he received via U.S. Mail a copy of Mount Dora's Motion for Default Final Judgment on October 9, 2023. *See* A-5. It is undisputed that Mount Dora failed to provide Bialostozky with a copy of the Motion for Clerk's Default and Default. *See* A-3, A-5 and A-6. Additionally, as set forth in the Emergency Motion and addressed at the hearing on the Emergency Motion, Mount Dora commenced several other actions against Bialostozky throughout the State of Florida. *See* A-5, A-6 and A-16. Had Bialostozky actually received notice of the instant lawsuit, he would have retained counsel to defend against this lawsuit as he has done in the other lawsuits. *See* A-5, A-6. Accordingly, Bialostozky satisfied the excusable neglect element. One questions why Mount Dora's counsel would not have advised

Bialostozky's counsel in the other pending matters of the instant lawsuit. Instead, Mount Dora and its counsel elected to employ an improper procedural "gotcha" so as to obtain a default against Bialostozky without having to deal with his defense of the instant action.

VII. CONCLUSION

For the reasons set forth herein, Bialostozky respectfully requests that this Court reverse the Order on appeal, vacate the void Clerk's Default and quash service of process.

VIII. CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief is in conformity with all font and word count requirements set forth in Florida Rule of Appellate Procedure 9.210 and Florida Rule of Appellate Procedure 9.130(e).

/s/ Megan Conkey Gonzalez
Megan Conkey Gonzalez, Esquire

IX. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May 2024, I electronically filed the foregoing document with the Clerk of Courts by using the court's E-Filing Portal system, which will send a notice of electronic filing to all counsel of record, including:

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