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. 5D24-0612
LT CASE NO. 2022-CA-000679

v.

GAHC3 MOUNT DORA FL MOB II, LLC,

Appellee.
_____/

APPELLEE, GAHC3 MOUNT DORA FL MOB II, LLC's ANSWER BRIEF

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INTRODUCTION

In this Brief, the Appellee, GAHC3 Mount Dora FL MOB II, LLC, will be referred to as ("Mount Dora") Appellant, Chaim Joseph Bialostozky a/k/a Joseph Bialostozky a/k/a Yoseph Bialostozky will be referred to as ("Bialostozky") Third parties will be referred to as follows: Jessica Duffy ("Duffy"), Rabbi Avraham Levin ("Avraham), Jacob Weintraub ("Weintraub") and Asher Levin ("Asher").

The designation "A" will refer to the first document in the Appendix. Specific page numbers where necessary will be referenced as "pg."

STATEMENT OF THE CASE AND FACTS

On March 31, 2022, a Consent Final Judgment was entered against Judgment Debtors, Hobart Investments, LLC and Timothy F. Majors ("Majors"), in the amount of $6,150,000.00, in Orange County, Florida Case Number 2017-CA-9860, jointly and severally, with interest to accrue at the post-judgment statutory rate pursuant to §55.03 Florida Statute. A-1, pg. 7. Through post judgment discovery, Mount Dora became aware of a fraudulent transfer to Bialostozky leading to the filing of the lawsuit in question on October 5, 2022. A-1. On December 21, 2022, service of process was

effectuated personally on Bialostozky at his home address as evidenced by the return of service. A-2. Despite receiving personal service of process of the Summons and Complaint, Bialostozky failed to timely respond to the lawsuit, resulting in the entry of a clerk's default on January 12, 2023. A-3.

Thereafter, Mount Dora moved to secure a default final judgment against Bialostozky. A-4. As noted in the certificate of service, Mount Dora mailed a copy of the motion for default final judgment to Bialostozky at his home address (the same address where service of process was effectuated). A-4.

Bialostozky filed his emergency motion to quash service of process and to vacate the clerk's default on October 20, 2023. A-5. In support of the motion, Bialostozky submitted affidavits from himself as well as Avraham, Weintraub and Asher. A-5, pg. 104 -114. Each of the affidavits state that on the date of service each of the witnesses claim to have seen Bialostozky attend morning prayer.

On January 25, 2024, Mount Dora filed its response along with its requests for judicial notice including multiple returns of service where Duffy previously served against Bialostozky at his home address. A-7.

Ultimately, an evidentiary hearing was held on February 1, 2024. At the hearing, the lower court heard testimony from Bialostozky, Duffy, Weintraub and Shapira. A-16.

As indicated by the lower court's order, Duffy successfully identified Bialostozky in Court and noted him as the individual she served on numerous prior occasions. A-16. Bialostozky even conceded that he was familiar with Duffy. A-16.

The lower court went on to find that Weintraub and Shapira each provided contradictory testimony from their previously submitted affidavits. A-16. Specifically, the lower court's order notes that Weintraub and Shapira filed affidavits attesting to being present with Bialostozky for service during the time in question. A-16. However, at the hearing, both witnesses receded from this position stating instead that because service takes place daily and Bialostozky attends such service on a daily basis that he was not at his home address. A-16. With this contradiction, the Court found that the testimony of Weintraub and Shapira should be "given far less weight than that of [Duffy]." A-16.

Ultimately, the Court entered its order denying Bialostozky's motion to quash service and order denying motion to vacate default

on February 5, 2024. This appeal ensued.

SUMMARY OF THE ARGUMENT

The trial court's order denying Bialostozky's motion should be upheld. After carefully weighing the evidence, Bialostozky failed to meet his burden to quash service of process. The testimony of Duffy was considered more credible than that of the contradictory testimony of Bialostozky and his supporting witnesses. Under these circumstances, the Court's finding that Bialostozky did not establish by "clear and convincing evidence" that service was invalid was the only reasonable result. The lower court's weighing of evidence must be affirmed, especially where Bialostozky fails to submit a transcript of the hearing.

This failure to rebut service also negates Bialostozky's argument that he established excusable neglect in failing to respond to the lawsuit or that Mount Dora knew he was represented by counsel. The sole argument raised by Bialostozky to establish excusable neglect was that he was not personally served with the lawsuit. Without the availability of a transcript, the lower court's findings must be afforded deference. This result is further underscored where the lower court

noted that the evidence provided by Bialostozky was contradictory and thus less credible than the testimony of Duffy. A-16.

In addition to the above evidentiary failures, Bialostozky failed to put forward evidence that Mount Dora "knew or should" that he had retained counsel or sought to defend the suit on the merits. Bialostozky cannot seek to have this Court read in evidence that was never presented to the lower court.

Lastly, Bialostozky's attempt to assert an argument of personal jurisdiction without having actually argued the point before the lower court is plainly improper and should be disregarded in its entirety.

STANDARD OF REVIEW

Before this Court are multiple questions of law and fact requiring the application of both a de novo and abuse of discretion standard where applicable.

A trial court's ruling on a motion to quash service of process is subject to a de novo standard of review. Moss v. Estate of Hudson, 252 So. 3d 785, 787 (Fla. 5th DCA 2018).

Further, while a trial court's decision regarding the proper application of rule 1.540(b) is reviewed de novo, See Casteel v. Maddalena, 109 So. 3d 1252, 1255 (Fla. 2d DCA 2013) the review of

an order denying a Rule 1.540(b) motion for relief from judgment is abuse of discretion. Collection & Recovery of Assets, Inc. v. Patel, 276 So. 3d 494 (Fla. 5th DCA 2019).

Thus, to the extent the Court reviews the judgment to determine whether the subject judgment is void the Court should apply a de novo review. Specialty Sols., Inc. v. Baxter Gypsum & Concrete, LLC, 325 So. 3d 192, 196 (Fla. 5th DCA 2018). However, in determining whether Bialostozky properly asserted excusable neglect, meritorious defense and due diligence, the Court should apply an abuse of discretion standard of review. Patel, 276 So. 3d 494 (Fla. 5th DCA 2019).

The abuse of discretion standard requires an appellate court to affirm the trial court's ruling "unless no reasonable person would adopt the trial court's view." May v. State, 326 So.3d 188, 191 (Fla. 1st DCA 2021) citing Salazar v. State, 991 So. 2d 364, 372 (Fla. 2008). See also Lewis v. Juliano, 242 So. 3d 1146, 1148 (Fla. 4th DCA 2018). This is known as "the reasonableness test." Kaye v. State Farm Mut. Auto Ins. Co., 985 So. 2d 675, 677 (Fla. 4th DCA 2008). "This test holds that the appellant must show clear error by the trial

court in its interpretation of the facts and the use of its judgment." Id.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONSIDERED THE EVIDENCE PROVIDED IN UPHOLDING SERVICE OF PROCESS.

When challenging service of process, the allocation of the burden of proof depends on whether a return of service is facially valid. Koster v. Sullivan, 160 So. 3d 385, 389 (Fla. 2015). A return of service is facially valid where it contains the statutory factors contained in §48.21 Fla. Stat. Id. If a return of service is facially valid on its face, then the party challenging service has the burden of overcoming that presumption by clear and convincing evidence. Id. (citing Klosenski v. Flaherty, 116 So. 2d 767, 768 – 69 (Fla. 1959)). Thus, where a party does not challenge the facial *validity* of the return of service, but instead merely challenges the *veracity* of the information on the return of service, the burden lies on the defendant to show by clear and convincing evidence that service was invalid. Robles-Martinez v. Diaz, Reus & Targ, LLP, 88 So. 3d 177, 181 (Fla. 3d DCA 2011).

Bialostozky's challenge to service does not implicate the requirements of §48.21 Florida Statute. Bialostozky was therefore required to show by clear and convincing evidence that service of process was not properly effectuated on him.

Clear and convincing is defined as evidence "that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." In re Standard Jury Instructions in Civil Cases — Report No. 09-01, 35 So. 3d 666, 726 (Fla. 2010). It is "a standard which requires more proof than a 'preponderance of the evidence' but . . . less than 'beyond and to the exclusion of a reasonable doubt.'" Inquiry Concerning a Judge No. 19-409, 338 So. 3d 848, 854 (Fla. 2022) (internal citations omitted). "This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Inquiry Concerning a Judge, 174 So. 3d 364. 369 (Fla. 2015).

Bialostozky asserts that he met this burden to quash service, as his testimony in conjunction with that of his supporting witnesses

was sufficient without any "hesitation or confusion." Initial Br. at 13. The problem with this argument is that Bialostozky fails to address the lower Court's detailed order finding that the evidence Bialostozky put forward was contradictory and therefore lacks credibility.

For example, the lower court noted that while Bialostozky's witnesses, Weintraub and Shapira, testified that Bialostozky attended service daily, they could not testify as to a particular date Bialostozky attended service. A-16. Further, Bialostozky fails in any way to address the Court's mention of the fact that these witnesses' testimony provided at the hearing conflicted with the accompanying affidavits put forth by these witnesses. A-13; A- 14; A-16.

Likewise, the lower court noted that while Bialostozky testified as to his habit of attending service daily, he could not testify as to his own whereabouts on the date service of process was effectuated against him. A-16.

Even more egregious, Bialostozky fails in any way to even attempt to discredit the testimony of Mount Dora's process server, Duffy. A-16. Duffy testified that she served Bialostozky on multiple occasions and even recognized him by sight. A-16. Bialostozky

himself noted that he recognized Duffy. A-16 Considering the above testimony the Court found that Duffy was credible. A-16.

As recently noted by the Second District Court of Appeals, "[f]or policy reasons, 'the affirmative testimony of the official process server acting in the regular routine of duty without a motive to misrepresent must be preferred to the negative evidence of one claiming not to have been served, either for reasons of public policy or as a matter of probability.'" KMG Props., LLC v. Owl Constr., LLC, 49 Fla. L. Weekly D893 (Fla. 2d DCA April 24, 2024) (citing Slomowitz v. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983). The lower court's order falls in conformity with this policy and should not be disturbed.

This is especially the case where Bialostozky failed to provide a transcript of the hearing for this Court's review. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) ("When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory.")

II. BIALOSTOZKY FAILED TO PRESERVE HIS PERSONAL JURISDICTION ARGUMENT FOR APPELLATE REVIEW.

"[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) (internal citations omitted); D.H. v. Adept Cmty. Servs., 271 So. 3d 870, 883 (Fla. 2018); see also Diaz v. Wells Fargo Bank, N.A., 189 So. 3d 279 (Fla. 5th DCA 2016) ("As to Appellants' argument that Bank's default letter was defective, we first observe that Appellants did not preserve for review their argument that Bank's default letter failed to "specify the default" because Appellants did not make this argument to the trial court.") "In order to be preserved for further review by a higher court, an issue must be presented to the lower court **and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved**." Sunset Harbour Condo. Ass'n v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) (emphasis added).

Here, Bialostozky engages in gamesmanship by asking this Court to consider a challenge to personal jurisdiction he never raised

before the trial court. As noted by Bialostozky in his initial brief, the lower court's order does not make any reference to Bialostozky's personal jurisdiction argument. Initial Br. at 17; A-16. Instead, Bialostozky asserts that because this argument was raised as part of his original emergency motion, that this somehow preserved the argument. Initial Br. at 17.

However, Bialostozky conveniently fails to mention that his personal jurisdiction argument was merely brought forward to satisfy the "meritorious defense" element of his Florida Rule of Civil Procedure 1.540 argument. See A-5, pg. 69.

In the context of a motion to set aside a default, "meritorious" means simply that the defendant plans to raise a defense that may have some merit. Household Fin. Corp., III v. Mitchell, 51 So. 3d 1238, 1241 (Fla. 1st DCA 2011). The movant need only show that the defense it has raised is meritorious, not that it is likely to succeed. See Rice v. James, 740 So. 2d 7 (Fla. 1st DCA 1999). Affirmative defenses, even when pled with minimal specificity, can qualify as meritorious. See, e.g., Elliott v. Aurora Loan Servs., LLC, 31 So. 3d 304 (Fla. 4th DCA 2010).

As illustrated above, the issue presented before the lower court was not whether it could assert personal jurisdiction over Bialostozky. The issue presented was whether Bialostozky's objection to personal jurisdiction fell within the ambit of "meritorious" as set forth above. Therefore, Bialostozky's objection to the pleadings of the complaint or his contacts with the state of Florida was not asserted before the lower court and thus has not been preserved for appellate review.

If Bialostozky truly had a good faith dispute as to what was considered by the lower court, he could have had the trial court approve a statement of the proceedings prepared in accordance with Florida Rule of Appellate Procedure 9.200(b)(5) or move for rehearing in a manner that might document whatever argument he intended to make. Instead, Bialostozky chose to blindside this Court with an argument never presented to the lower court and then have Mount Dora respond to said argument without the benefit of having briefed the issue or present its evidence to the lower court.

The only reason Bialostozky would choose to take such a reckless course of conduct is because he knows that if he attempts to honestly put forward his jurisdictional arguments, he would likely

be barred from doing so under a theory of res judicata pursuant to this Court's prior decision in Bialostozky v. Gahc3 Mount Dora FL Mob II LLC, No. 5D23-1874, 2024 Fla. App. LEXIS 625 (5th DCA Jan. 30, 2024) (Per curiam affirmance of lower court's order finding that trial court properly asserted general jurisdiction over Bialostozky).

Nevertheless, this argument was not preserved for appellate review and cannot serve as a basis for reversal of the lower court's order.

III. THE COMPLAINT PLEAD A BASIS TO ASSERT GENERAL JURISDICTION OVER BIALOSTOZKY

While not properly preserved, Mount Dora will still address Bialostozky's personal jurisdiction argument as best it can. When examining whether a Florida court can exercise personal jurisdiction over a non-resident, the court must first determine whether the complaint pled an initial basis for service on the non-resident under Florida's "long arm statute." Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989). "To be sure, a plaintiff does not need to plead much in the way of jurisdictional facts." Murphy v. Murphy, 342 So. 3d 799, 803 (Fla. 1st DCA 2022); see also Covenant Tr. Co. v. Ihrman, 45 So. 3d 499 (Fla. 4th DCA 2010) ("For example, it is

sufficient for a plaintiff to plead language tracking the statute without any factual support for the jurisdictional basis. See Fla. R. Civ. P. 1.070(h) (providing that when service of process "is to be made under statutes authorizing service on nonresidents," the basis for service may be pleaded "in the language of the statute without pleading the facts supporting service"). However, a plaintiff is authorized to allege facts indicating that the non-resident defendant's actions fall within the long arm statute, without citing to the applicable statute. Murphy, 342 So. 3d at 803. (citing Dep't of Legal Affairs v. Wyndham Int'l, Inc., 869 So. 2d 592, 596 (Fla. 1st DCA 2004)).

Caiazzo v. Am. Royal Arts Corp., 73 So. 3d 245 (Fla. 4th DCA 2011) is illustrative. There, a corporation moved to assert personal jurisdiction over an individual New Jersey resident. Id. at 249. When considering the sufficiency of the pleadings, the court found that jurisdiction was adequately alleged despite the jurisdictional allegations being "barebones." For example, when considering whether the complaint properly alleged jurisdiction over the New Jersey resident to bring a claim under FDUPTA, the court found that

the following allegation was sufficient to allege jurisdiction pursuant to § 48.193(1)(a) Fla. Stat. (2007)[1]:

> "[T]his action is based in part upon the unlawful actions of [the New Jersey resident] while he resided and transacted [his business] . . . in Florida from November 2004 and December 2005."

Id. at 257. The Caiazzo court further found that the following jurisdictional allegation was sufficient to subject the New Jersey Resident to the jurisdiction of the trial court pursuant to § 48.193(1)(b) Fla. Stat. (2007)[2] in relation to a separate claim of defamation:

> "[T]hat [the New Jersey resident] directly or through agents made defamatory statements which were published and circulated in Florida, including

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[1] (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

[2] (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(b) Committing a tortious act within this state.

> telephone calls made directly to ARA's employees in South Florida.

Id. at 258. While neither of the above allegations perfectly tracked the precise language of the applicable version of §48.193 Fla. Stat., the court found that it sufficiently fell under Florida's long arm statute for purposes of the pleading requirement. Id at 257-258.

Schwartzberg v. Knobloch, 98 So. 3d 173 (Fla. 2d DCA 2012) is also instructive. The operative allegation of the Knobloch complaint alleging jurisdiction under §48.193(2) Fla. Stat. read as follows:

> [Appellants] conducted and engaged in business activities within the State of Florida; engaged in substantial and not isolated activities within the State of Florida; and purposely [took advantage] of the privileges of the State of Florida, through . . . ownership of, leasing of, operation of, management of, and/or consultation with nursing homes, including PALM TERRACE OF LAKELAND, within the State of Florida.

Id. at 177. Upon review, the parties to the lawsuit agreed that for purposes of pleading jurisdiction the complaint plead a sufficient basis under the operative version of §48.193 Fla. Stat. for service of process, which finding was not disturbed by the Court of Appeals. Id. at 178.

Here, Mount Dora's complaint contains the following jurisdictional allegation: "[Bialostozky], engages in continuous and systematic real estate transactions in Florida, including the transaction at issue below, such that [Bialostozky] has assented to the jurisdiction of Florida." A-1, pg. 6, para. 5. Just like the allegations at issue in Caiazzo or Knobloch, this jurisdictional pleading may not perfectly track the language of Florida's long-arm statute; however, it is clearly availing itself of §48.193(2) Fla. Stat.'s purpose that defendants who engage in "substantial and not isolated" are subjected to the general jurisdiction of Florida. This is especially apparent where Florida case law defines the phrase "substantial and not isolated" to mean "continuous and systematic." See e.g. Nw. Aircraft Cap. Corp. v. Stewart, 842 So. 2d 190, 195 (Fla. 5th DCA 2003).

Elmex Corp. v. Atl. Fed. Sav. & Loan Asso., 325 So. 2d 58 (Fla. 4th DCA 1976) provides additional guidance. There, a non-resident defendant appealed a decision denying its motion to dismiss a complaint for lack of personal jurisdiction. Id at 60. The Elmex plaintiff's complaint alleged that the defendant "derives substantial revenue from the sale of items of tangible personal property, both

directly and through wholesalers and distributors, to persons and firms within the State of Florida." Id. The remainder of the complaint alleged a breach of contract stemming from a single purchase order. Id. To support its motion to dismiss, the defendant filed an affidavit listing various instances of "non-business activity in the State of Florida." Id at 62. Critically, this affidavit failed to address the allegation of the complaint pertaining to the defendant's alleged "sale of items" in the state of Florida. Id. In affirming the lower court's order denying dismissal, the appellate court found that this allegation alone was sufficient to meet Florida's pleading requirement for personal jurisdiction of a non-resident, as the remainder of the complaint failed to plead a basis for jurisdiction under §48.181 Fla. Stat. (1976). Id. at 63. Thus, the defendant would have to show by affidavit that such a statement was false to contest the court's jurisdiction over him. Id.

As in Elmex, once Mount Dora successfully showed that Bialostozky engages in "continuous and systematic" real estate transactions in Florida, then Bialostozky is subject to the trial court's jurisdiction under §48.193(2) Fla. Stat. Accordingly, Mount Dora's

complaint pled a sufficient basis to exercise jurisdiction over Bialostozky.

Bialostozky contests this claiming that the jurisdictional allegations of Mount Dora's complaint are "vague and conclusory." Initial Br. at 23. Instead, Bialostozky asserts that Mount Dora was required to allege additional jurisdictional facts to bring the complaint within the ambit of Florida's long arm statute. Initial Br. at 24. The error of this argument is that none of the authorities cited in Bialostozky's initial brief are remotely like the pleadings at issue in this case and cannot support Bialostozky's inflated pleading requirement.

The first two cases Bialostozky relies on are readily distinguishable, as both turned on whether the complaints properly alleged various tort claims under Florida's requirements for said tort claims. Initial Br. at 24. See Parisi v. Kingston, 314 So. 3d 656 (Fla. 3d DCA 2021) (finding that the complaint failed to allege a claim for civil conspiracy as it did not allege "specific allegations" of conspiracy as required to bring a claim of civil conspiracy. Further, the complaint also failed to comport with Florida's pleading requirement to bring an alter ego claim as it failed to allege with specific the

elements of the alter ego claim.); see Russo v. Fink, 87 So. 3d 815 (Fla. 4th DCA 2012) (finding that the subject complaint failed to plead causes of action for civil conspiracy, conversion, or civil theft and thus fell outside the reach of §48.193(1)(b) Fla. Stat. (2010) (allowing for specific jurisdiction when a defendant commits a tortious act within the state).

The third case relied on by Bialostozky is also inapplicable, as the court did not even consider the pleading requirements of the complaint at issue in that dispute. Initial Br. at 24. Res. Healthcare of Am., Inc., v. Mckinney, 940 So. 2d 1139, 1143 (Fla. 2d DCA 2006) (finding that the competing affidavits and deposition testimony did not support a finding a jurisdiction under §48.193 Fla. Stat. (2003)). This case is of no value to the issue at hand.

In light of the above, the allegations of the Complaint properly allege a basis to exercise general jurisdiction over Bialostozky.

IV. MOUNT DORA PROPERLY SOUGHT A CLERK'S DEFAULT AGAINST BIALOSTOZKY.

Bialostozky next asserts he was entitled to notice of Mount Dora's motion for clerk's default as purportedly, Mount Dora, "knew or should have known that Bialostozky had counsel and that he

intended to defend that instant lawsuit on the merits" Initial Br. pg. 28. Bialostozky's contention is meritless.

Generally, Florida Rule of Civil Procedure 1.500 permits the entry of a clerk's default without notice to the defendant. KB Home Ft. Myers Ltd. Liab. Co. v. Taishan Gypsum Co., Ltd., 336 So. 3d 841,849 (Fla. 2d DCA 2022). However, where a plaintiff knows that a defendant has retained counsel and intends to defend the lawsuit, the plaintiff is required to notify defendant's counsel prior to the application for default. See e.g. JP Morgan Chase Bank, N.A. v. Wells Fargo Bank, N.A., 103 So. 3d 282 (Fla. 5th DCA 2012). Thus, "[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.'" U.S. Bank Nat'l Ass'n v. Lloyd, 981 So. 2d 633 (Fla. 2d DCA 2008) (quoting Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. McWilliams, 799 So. 2d 378, 380 (Fla. 4th DCA 2001).

Here, Bialostozky failed to provide any evidence to the trial court to meet either of these elements. The trial court's order noted that Bialostozky "vaguely" testified that he "was on the lookout for legal

documents," and would send said documents to his attorney when received. A-16. The lower court's order goes on to note that Bialostozky never testified that he sent these documents to his attorney. A-16, pg. 250.

None of this could possibly support the notion that Mount Dora had any actual knowledge of Bialostozky's supposed representation, let alone that Bialostozky had any desire to defend this lawsuit on the merits.

Bialostozky does not even attempt to address the evidence listed in the order, but instead muddies the water by attempting to sneak in evidence not submitted to the lower court through his brief. As an example, Bialostozky asserts that Mount Dora knew that Bialostozky would defend himself in this action because Bialostozky hired an attorney in two other actions where Mount Dora sued entities of which Bialostozky is a manager and/or a member of. Initial Br. pg. 31. None of this is addressed in the lower court's order, and thus cannot serve as a basis for reversal.

Bialostozky goes on to accuse the lower court of confusing the appropriate standard in its order. Specifically, Bialostozky takes issue with the follow portion of the order on appeal:

> "[Bialostozky] failed to establish the ten existing representation or whether the attorney announced a willingness to accept service on [Bialostozky's] behalf"

A-16. Bialostozky argues that the above cited language confuses the appropriate standard by requiring Bialostozky 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." Initial Br. pg. 33. Nothing of the sort occurred.

To establish that Bialostozky was entitled to notice of Mount Dora's motion for clerk's default, he had to show both that Mount Dora knew that Bialostozky was represented and desired to defend the present lawsuit on the merits. If Bialostozky cannot establish that he had an existing relationship with an attorney, it logically follows that Mount Dora would not have actual knowledge of this nonexistent relationship. Similarly, if Bialostozky's attorney is unwilling to accept service of process it must also follow that Bialostozky had no intention of defending the merits of the underlying claim. Instead, that attorney likely intends to merely avoid service to prevent Mount Dora from pursuing the merits of its claim.

Bialostozky and Mount Dora clearly have different views on what evidence and arguments were put forward before the lower

court. Without a record of the proceedings below, this Court is bound by the Applegate presumption that the trial court acted properly and should uphold the lower court's order. Applegate, 377 So. 2d 1150, 1152 (Fla. 1979).

V. BIALOSTOZKY FAILED TO DEMONSTRATE EXCUSABLE NEGLECT OR DUE DILIGENCE IN ATTEMPTING TO VACATE THE DEFAULT.

Fla. R. Civ. P. 1.500(d) allows a court to set aside a default upon a showing of i.) excusable neglect in failing to timely respond to the allegations of the complaint, ii.) due diligence in seeking relief from a default after seeking discovery of same; and iii) the existence of a meritorious defense. Santiago v. Mauna Loa Investments, LLC, 189 So. 3d 752, 758 (Fla. 2016). The burden of establishing these three elements rests upon the movant. Geer v. Jacobsen, 880 So. 2d 717, 720 (Fla. 2d DCA 2004). While it is true, that "all reasonable doubts should be resolved in favor of setting aside the default," the failure of the movant to establish any one of the three elements requires that the motion to vacate be denied. Household Fin. Corp., III v. Mitchell, 51 So. 3d 1238, 1241 (Fla. 1st DCA 2011).

i. Bialostozky failed to Establish 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." Elliott v. Aurora Loan Servs., LLC, 31 So. 3d 304, 307 (Fla. 4th DCA 2010). To show excusable neglect, a party must make "'more than a conclusionary statement'" and "'must set forth facts explaining or justifying the mistake or inadvertence.'" Inter-Atlantic Insurance Services, Inc. v. Hernandez, 632 So. 2d 1069, 1070 (Fla. 3d DCA 1994), (quoting B. C. Builders Supply Co. v. Maldonado, 405 So. 2d 1345, 1348 (Fla. 3d DCA 1981)). See Bank of America, N.A. v. Lane, 76 So. 3d 1007 (Fla. 1st DCA 2011); Fierro v. Lewis, 388 So. 2d 1361 (Fla. 5th DCA 1980).

The movant must file an affidavit or sworn statement explaining or justifying the mistake or inadvertence in failing to comply with the applicable deadline. Coquina Beach Club Condo. Ass'n v. Wagner, 813 So. 2d 1061, 1063 (Fla. 2d DCA 2002); United Capital Funding Corp. v. Technamax, Inc., 946 So. 2d 63, 64 (Fla. 2d DCA 2006). An affidavit that does not contain a supporting factual basis for the

alleged excusable neglect will not suffice to meet this burden. L.B.T. Corp. v. Camacho, 429 So. 2d 88, 90 (Fla. 5th DCA 1983).

Here, Bialostozky's sole claim to excusable neglect stems from his assertion that he never received the service of process. However, as detailed in the preceding section, Mount Dora established that Bialostozky received service of process in this matter. With no other basis to establish excusable neglect, the lower court simply did not have any factual basis for which it could find excusable neglect.

This Court addressed a nearly identical matter in Emmer v. Brucato, 813 So. 2d 264 (Fla. 5th DCA 2002). There, a defaulted defendant ("Emmer") moved to vacate a default asserting that his failure to respond to the complaint was excusable as he was never served with process in the lawsuit. Id. This Court rejected Emmer's argument, finding that where a party asserts lack of service as excusable neglect, he must establish that such service was invalid under the standard governing motions to quash for lack of service. Id. at 266 (citing Aboudraah v. Tartus Group, Inc., 795 So. 2d 79 (Fla. 5th DCA 2000). This Court found that Emmer failed to meet this burden, and therefore upheld the order denying the motion to vacate for failure to establish excusable neglect. Id.

Bialostozky's excusable neglect defense suffers the identical fatal defect as in Emmer. Here, the sole alleged basis to establish excusable neglect is that Bialostozky was not served with process. However, this alleged basis was repudiated by the evidence presented showing that Bialostozky was properly served. Therefore, Bialostozky failed to establish excusable neglect.

ii. Bialostozky failed to Establish that he Acted with Due Diligence in Moving to Vacate the Default.

Florida law also requires that a defendant act with due diligence in seeking relief from default. The requirement that one move expeditiously to nullify a default is directly related to the reasons for the entry of the default in the first place—to provide for the prompt disposition of legal proceedings. Techvend, Inc. v. Phoenix Network, Inc., 564 So. 2d 1145, 1146 (Fla. 3d DCA 1990). Due diligence must be evaluated in terms of the particular facts of the case under consideration. Rosenblatt v. Rosenblatt, 528 So. 2d 74, 76 (Fla. 4th DCA 1988); B.C. Builders Supply Co. v. Maldonado, 405 So. 2d 1345 (Fla. 3d DCA 1981); Franklin v. Franklin, 573 So. 2d 401, 403 (Fla. 3d DCA 1991).

Due diligence "is a test of reasonableness." Elliott v. Aurora Loan Services, LLC, 31 So. 3d 304, 308 (Fla. 4th DCA 2010). Due diligence must be established with evidence, which includes a sworn affidavit. Id. The court must consider both the extent of the delay and the reasons for the delay. Professional Golf Global Group, LLC v. Huynh, 251 So. 3d 1038 (Fla. 2d DCA 2018).

The evidence put forward by Bialostozky failed to establish that he acted with due diligence in vacating the default. Here, Bialostozky's sole excuse for failing to act with due diligence is allegedly, he first discovered the default on October 9, 2023. The lower court simply did not find Bialostozky's testimony credible on this point and found that he knew of the default and waited a year to vacate said default. A-16. "In the absence of a transcript, the trial court's factual findings are presumed correct." Applegate, 377 So. 2d at 1152; Squires v. Darling, 834 So. 2d 278 (Fla. 5th DCA 2002). Because Bialostozky failed to provide a transcript of the lower court's hearing, he cannot rebut this presumption.

CONCLUSION

For the reasons set forth herein, Mount Dora respectfully requests that this Court affirm the lower court's order and grant any other relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was filed on this 10th day of July 2024 with the Florida courts e-filing portal which will automatically transmit a copy of same to all designated counsel of record pursuant to Fla. R. Jud. Admin 2.516(b)(1) as detailed below:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with Rule 9.210 and Rule 9.045 of the Florida Rules of Appellate Procedure, regarding font and word count requirements for computer-generated briefs. This brief is printed in Bookman Old Style 14-point font with 1-inch margins on all sides and double spaced.

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