STATEMENT OF THE CASE

Appellee, BAC HOME LOANS SERVICING, L.P., f/k/a COUNTRYWIDE HOME LOANS SERICING, L.P. ("BAC") initiated the lower court proceeding by suing Appellant, LEONADRO DIGIOVANNI ("DiGiovanni"), individually and as Trustee, for mortgage foreclosure. Appendix to Initial Brief, 1.

In response to BAC's attempts to effectuate service of process by publication, Appendix to Initial Brief, 2, DiGiovanni retained the undersigned, who filed a Notice of Appearance and a Motion for Extension of Time ("the Motion for Extension") to respond to the Complaint.[1] Appendix to Initial Brief, 3, 4. The Motion for Extension provided, in pertinent part:

> There are numerous attachments to the Complaint which must be thoroughly reviewed before a substantive response can be prepared. Also, it appears that Defendant may have a 1.140(b) defense, which would require that the undersigned communicate with him and prepare necessary affidavits before responding.

Appendix to Initial Brief, 4.

After the lower court entered an Agreed Order granting the Motion for Extension, Appendix to Initial Brief, 5, DiGiovanni, acting in his individual capacity and as Trustee, filed a Motion to Dismiss Complaint as well as a Verified Motion to Quash Substitute Service and Abate for Lack of Personal Jurisdiction

[1] DiGiovanni filed the Notice of Appearance and Motion for Extension only in his individual capacity, not his capacity as trustee. Appendix to Initial Brief, 2, 3.

("Motion to Quash"). Appendix to Initial Brief, 6, 7. DiGiovanni verified the Motion to Quash under penalty of perjury, alleging:

> [BAC's] affidavit reflects that [DiGiovanni] was evading service. That is simply not true. As [BAC] knows, [DiGiovanni] lives in California. As far as [DiGiovanni] can tell, [BAC] never even tried to effectuate personal service on [DiGiovanni] in California. Additionally, nobody ever told [DiGiovanni], at any time, ever, that someone was trying to serve him in this case. Candidly, it seems that [BAC] was too lazy to try to serve [DiGiovanni] and resorted to substitute service too quickly.

Thereafter, proceeding *sua sponte*, without notice, and without hearing, the lower court entered its Order Denying Defendants' Motion to Dismiss Plaintiff's Complaint & Motion to Quash.[2] Appendix to Initial Brief, 8. In its Order, the lower court explained its rationale for denying the Motion to Quash:

> Defendant submitted himself to the jurisdiction of the Court by filing a motion for extension of time, before filing the Motion to Quash. The Defendant sought affirmative relief from the Court.

Appendix to Initial Brief, 8.

As the lower court made this ruling *sua sponte* and without a hearing, it did not afford DiGiovanni the opportunity to present any case law on this issue, i.e. whether a Notice of Appearance and/or Motion for Extension waives jurisdictional challenges. Essentially, the court ruled Defendant waived his jurisdictional

[2] Although the lower court also denied the Motion to Dismiss, that portion of the Order is not appealable until the end of the case. Hence, the instant appeal is limited to the portion of the Order rejecting DiGiovanni's service defense.

challenge, *sua sponte*, without notice, without case citations, and without giving DiGiovanni a chance to be heard.

Upon receipt of this Order, DiGiovanni quickly prepared a Motion for Rehearing or Reconsideration ("Motion for Rehearing"), citing case law which stands for the proposition that a Notice of Appearance and Motion for Extension do not operate as a waiver of a defendant's right to challenge service of process. Appendix to Initial Brief, 9 (citing Barrios v. Sunshine State Bank, 456 So. 2d 590 (Fla. 3d DCA 1984)). Quite candidly, as DiGiovanni had never been given a chance to present these authorities previously, and the court was apparently unfamiliar with this proposition of law, DiGiovanni believed the lower court would, upon receipt of these authorities, change course (without the need for an appeal).

For nearly a month, DiGiovanni's undersigned counsel waited for word from the lower court, only to receive none. Hence, as the 30-day deadline to file the instant appeal approached, DiGiovanni filed his Emergency Request for Ruling, hoping to obtain a hearing or some sort of ruling from the court (which DiGiovanni presumed would obviate the need for the instant appeal).[3] Appendix to Initial Brief, 10. In response, the lower court entered its Order Denying Defendants'

[3] As the Order was not a final Order, DiGiovanni knew his Motion for Rehearing would not toll the time to bring this appeal.

Motion for Rehearing on Defendants' Motion to Quash ("Order Denying Rehearing"). Appendix to Initial Brief, 11.

In the Order Denying Rehearing, the lower court ruled "Defendant submitted himself to the jurisdiction of the Court by filing a 'Notice of Appearance' and 'Motion for Extension to Respond to Complaint.'" Tellingly, the lower court again made this ruling without any case citations, this time without attempting to distinguish Barrios, cited in DiGiovanni's Motion for Rehearing. Additionally, and perhaps realizing its ruling on waiver was erroneous, the lower court asserted BAC's service of process via publication was valid because BAC's affidavit reflected DiGiovanni had evaded service. In so ruling, the lower court accepted BAC's affidavits as true and ignored DiGiovanni's sworn assertions otherwise without conducting an evidentiary hearing to resolve the factual dispute. Appendix to Initial Brief, 11.

At no time did the lower court afford DiGiovanni any type of hearing (evidentiary or otherwise) on the Motion to Quash or the Motion for Rehearing.

DiGiovanni now brings this timely appeal.

SUMMARY OF ARGUMENT

I. THE LOWER COURT ERRED BY DENYING DIGIOVANNI'S MOTION TO QUASH SERVICE (WITHOUT A HEARING).

It is black-letter law that a Notice of Appearance and a Motion for Extension

of Time do not operate as a waiver of a defendant's right to challenge service of process or personal jurisdiction. The lower court's ruling otherwise, entered *sua sponte*, without notice, and without hearing, is erroneous and requires reversal.[4]

Confronted with this black-letter law in the Motion for Rehearing, the lower court pointed, for the first time, to BAC's affidavit showing DiGiovanni allegedly evaded service. However, DiGiovanni denied these assertions in detail in the Motion to Quash, which he verified under penalty of perjury. Faced with conflicting affidavits on whether DiGiovanni evaded service, the lower court was required to conduct an evidentiary hearing, not merely accept BAC's affidavit as true. The stringent standards applicable to service by publication demand as much, and the court's ruling otherwise mandates reversal.

For the reasons stated herein, this Court should reverse the Order on review and remand for an evidentiary hearing.

ARGUMENT

"The standard of review of the trial court's application and interpretation of Florida law is *de novo*." Anthony v. Gary J. Rotella & Assocs., P.A., 906 So. 2d

[4] Alternatively, even if the Notice of Appearance or Motion for Extension could somehow be deemed a waiver, DiGiovanni filed them only in his individual capacity. As the Motion to Quash was the first motion DiGiovanni filed in his capacity as trustee, DiGiovanni did not waive his right to challenge service of process or the court's jurisdiction over him in his capacity as trustee.

1205, 1207 (Fla. 4th DCA 2005) (the trial court reversibly erred in ruling the defendant waived its motion to quash service). Additionally, "the standard of review of a non-final order that determines the jurisdiction of the person is *de novo*." Bank of America v. Bornstein, 39 So. 3d 500, 502 (Fla. 4th DCA 2010) (reversing an order denying a motion to quash service and remanding for an evidentiary hearing). As such, the standard of review for the instant appeal is *de novo*.

I. THE LOWER COURT ERRED BY DENYING DIGIOVANNI'S MOTION TO QUASH SERVICE (WITHOUT A HEARING).

Proceeding *sua sponte*, without notice, without hearing, and without case citations, the lower court ruled DiGiovanni waived his 1.140(b) defenses by filing a Notice of Appearance and Motion for Extension of Time. This ruling is contrary to controlling precedent and should be reversed.

Although BAC's affidavit asserted DiGiovanni evaded service, DiGiovanni's Verified Motion to Quash showed otherwise. In the face of this factual dispute, the lower court should have conducted an evidentiary hearing, to include findings on whether personal service "could not be had." The lower court's refusal to give DiGiovanni an evidentiary hearing (or, for that matter, a hearing of any type) requires reversal.

A. DiGiovanni did not waive his jurisdictional challenge via his attorney's Notice of Appearance or Motion for Extension of Time.

In 1982, the Florida Supreme Court was presented with conflicting district court decisions on whether the filing of a Notice of Appearance constituted a waiver of a defendant's right to challenge service of process. Public Gas Co. v. Weatherhead Co., 409 So. 2d 1026 (Fla. 1982). Answering the question with an unequivocal "no," the Court explained:

> There is no basis in the rules and no reason in policy for a determination that the mere filing of an entirely innocuous piece of paper, which indicates no acknowledgement of the court's authority, contains no request for the assistance of process, and, most important, reflects no submission to its jurisdiction should nevertheless be given just that effect. Such a conclusion represents, we think, no less than the apotheosis of a meaningless technicality. It cannot be accepted in a judicial era which requires that, as far as is consistent with orderly procedure, the rights of parties be decided on the merits of their positions. …
>
> We agree with the holding of the district court that the filing of a 'notice of appearance' by Weatherhead's counsel did not waive its right to claim lack of jurisdiction over its person, and we approve the district court's rational in reaching this decision. To the extent that the prior decisions of the other district courts are in conflict, they are disapproved.

Id. at 1027.

In the ensuing years, Public Gas has routinely been cited for the proposition that a Notice of Appearance and Motion for Extension of Time do not operate to waive a defendant's challenges to service of process or personal jurisdiction. See

Barrios v. Sunshine State Bank, 456 So. 2d 590 (Fla. 3d DCA 1984) ("The single issue presented by this appeal is whether the filing of Barrios' attorney of a Motion for Enlargement of Time constituted a general appearance and hence a waiver of Barrios' defense of lack of personal jurisdiction and insufficiency of service of process. It does not."); Mason v. Hunton, 816 So. 2d 234 (Fla. 5th DCA 2002) ("Filing a notice of appearance by counsel does not constitute a waiver of personal jurisdiction.").

In light of these authorities, the lower court reversibly erred by ruling the Notice of Appearance and Motion for Extension constituted affirmative relief and waived Defendant's right to challenge service of process and personal jurisdiction. Applying a *de novo* standard of review, see Anthony and Bornstein, supra, this Court should reverse.

Even if this Court were to somehow disagree with this general proposition of law, a finding of waiver is unsupportable on the facts at bar in light of two other factors. First, the Notice of Appearance and Motion for Extension were filed by DiGiovanni only in his individual capacity, not his capacity as Trustee. Appendix to Initial Brief, 3, 4. As the Motion to Quash was the first document DiGiovanni filed, he clearly did not waive any 1.140(b) defenses in his capacity as Trustee.

Second, DiGiovanni expressly advised the Court, in his Motion for

Extension, that he was seeking an extension of time for the purpose of communicating with his undersigned counsel and executing any affidavits which would be necessary to support a 1.140(b) defense. Appendix to Initial Brief, 4. Where DiGiovanni was expressly telling the parties and the lower court that he was intending to file such a defense in the first paper he filed, and the court entered an Order granting that motion, Appendix to Initial Brief, 5, it strains logic to see how this could constitute a waiver of such a defense. See Public Gas, 409 So. 2d at 1027 ("an innocuous piece of paper").

The lower court's finding of waiver was error. This Court should reverse.

B. Facing disputed facts, the lower court was required to conduct an evidentiary hearing on the Motion to Quash.

Service of process by publication is strongly disfavored and is authorized only in limited circumstances. As the Fifth District recently explained:

> A fundamental requirement of due process in any judicial proceeding is notice reasonably calculated to both apprise interested parties of the pendency of the action, and to give the party so notified an opportunity to present his or her side of the controversy. Due process considerations take into account the need to serve a party by publication when the circumstances authorize it, but notice by publication is generally regarded as insufficient with respect to an individual whose name and address are known or easily ascertainable.
>
> … Where personal service of process cannot be had, service of process by publication may be utilized in any case allowed by section 49.011 … In any case, the determinative factor is whether personal service "cannot be had." …

> The test to be applied is whether the plaintiff reasonably employed the knowledge at his or her command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the surrounding circumstances to acquire the information necessary to enable the plaintiff to effect personal service on the defendant.

Miller v. Partin, 31 So. 3d 224, 227 (Fla. 5th DCA 2010) (quoting Gans v. Heathgate-Sunflower Homeowners Ass'n, Inc., 593 So. 2d 549, 551 (Fla. 4th DCA 1992)).

Here, BAC took the position that personal service "cannot be had" upon DiGiovanni because he was evading service, using that allegation to justify its attempt to effectuate service by publication. Appendix to Initial Brief, 2. However, DiGiovanni contradicted that assertion in detail and under oath, asserting personal service "can be had":

> [BAC's] affidavit reflects that [DiGiovanni] was evading service. That is simply not true. As [BAC] knows, [DiGiovanni] lives in California. As far as [DiGiovanni] can tell, [BAC] never even tried to effectuate personal service on [DiGiovanni] in California. Additionally, nobody ever told [DiGiovanni], at any time, ever, that someone was trying to serve him in this case. Candidly, it seems that [BAC] was too lazy to try to serve [DiGiovanni] and resorted to substitute service too quickly.

Appendix to Initial Brief, 7.

When presented with conflicting affidavits on the dispositive question of whether personal service "can be had," see Gans, the trial court was not permitted to accept BAC's affidavits as true and ignore/reject DiGiovanni's affidavits,

particularly without the benefit of an evidentiary hearing. To wit, many Florida cases have illustrated the need for an evidentiary hearing in such a context. See Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 503 (Fla. 1989) (where factual issues in affidavits filed by parties concerning personal jurisdiction cannot be reconciled, the trial court was required to hold a "limited evidentiary hearing" to resolve the issue); Beneficial Florida, Inc. v. Washington, 965 So. 2d 1211, 1213 (Fla. 5th DCA 2007) ("The trial court should have held an evidentiary hearing in order to insured adequate consideration of the disputed facts relevant to the motion to quash service of process."); Koniver Stern Group v. Layfield, 811 So. 2d 812 (Fla. 3d DCA 2002) (reversing and remanding for evidentiary hearing); Linville v. Home Savings Bank of America, 629 So. 2d 295, 296 (Fla. 4th DCA 1993) ("Appellant is therefore entitled to an evidentiary hearing on her motion to quash service of process.").

After an evidentiary hearing, the lower court may conclude that the process server was lying or mistaken, that the person he allegedly saw was not DiGiovanni, that DiGiovanni did not evade service, and that BAC did not make an "honest and conscientious" effort to effectuate personal service. See Miller and Gans. Conversely, the lower court may conclude, after an evidentiary hearing, that DiGiovanni saw the process server, knew he was being served, evaded service, and

that personal service by publication was permissible. Either way, DiGiovanni was entitled to an evidentiary hearing, with notice and an opportunity to be heard, particularly since service by publication is so disfavored.

With respect to the lower court, a motion such as the Motion to Quash should not have been resolved *sua sponte*, without notice, without hearing (evidentiary or otherwise), and without case citation. This Court should reverse and remand for an evidentiary hearing.

CONCLUSION

In light of the foregoing, this Court should reverse the Order on review and remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Brandon Mullis, Esq., 4630 Woodland Corp. Blvd., Suite 100, Tampa, FL 33614-2429 on this 31st day of October, 2011.

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Mark P. Stopa, Esquire
FBN: 550507
STOPA LAW FIRM
2202 N. Westshore Blvd., Suite 200
Tampa, FL 33607
(727) 851-9551
MarkPStopa76@aol.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Initial Brief complies with the font requirements of Fla.R.App.P. 9.210(a).

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Mark P. Stopa, Esquire