

IN THE FIRST DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

ANA F. BASANTES, a/k/a,
ANA FINOTTI-CORTEZ,

Appellant,

Case No.: 1D12-

v.

L.T. No.: 2011-CA-006939

BANK OF AMERICA, N.A.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

Appellee, BANK OF AMERICA, N.A. (“BOA”) initiated the lower court proceeding by suing Appellant, ANA BASANTES, a/k/a ANA FINOTTI-CORTEZ (“Basantes”), for mortgage foreclosure. Appendix to Initial Brief, 1.

Attempting to substantiate its attempts at personal service, BOA filed a Return of Service, showing Basantes was personally served. However, the Return of Service, on its face, did not reflect that Basantes was informed of the contents of the papers with which she was served, i.e. the Summons and Complaint. Rather, the Return of Service reflected only that those documents were delivered to her. Appendix to Initial Brief, 2.

Meanwhile, Basantes engaged in loan modification discussions with BOA, which misled her into believing that she need not respond to the foreclosure lawsuit. Appendix to Initial Brief, 3. Nonetheless, BOA proceeded with that lawsuit and obtained a clerk’s default.

Upon realizing the lawsuit was proceeding on the merits, Basantes filed a Verified Motion to Quash Service and Vacate Default (“Motion to Quash”). In that motion, Basantes verified under oath that she was not informed of the contents of the Summons and Complaint, as required by Fla. Stat. 48.031. She also argued the lower court lacked jurisdiction over her person because service was ineffectual.

Appendix to Initial Brief, 3.

BOA filed no affidavits or other evidence in opposition to the Motion to Quash. Despite Basantes' undisputed evidence, the lower court denied the Motion to Quash without explanation.¹ Appendix to Initial Brief, 4.

Basantes filed an Emergency Motion for Stay Pending Appeal. Appendix to Initial Brief, 5. The lower court granted that motion, ensuring the issue of the lower court's jurisdiction over Basantes' person was preserved for review by this Court. Appendix to Initial Brief, 6.

This timely appeal ensued.

¹ The lower court did grant that portion of the motion which sought to vacate the default. Hence, Basantes does not discuss that issue herein.

SUMMARY OF ARGUMENT

The law is clear. Florida Statute 48.031(1)(a) requires that a process server inform a defendant of the content of the Summons and Complaint upon effectuating personal service. Here, it was undisputed that Plaintiff did not satisfy that obligation. The lower court had no basis in which to ignore this undisputed evidence, and the Motion to Quash should have been granted.

The Return of Service was irregular on its face, as it did not reflect that the process server informed Basantes of the content of the papers being served upon her. As such, it was BOA's burden to establish proper service. BOA plainly failed to meet this burden, particularly in light of Basantes' uncontroverted, verified motion.

This Court should quash the Order on review and remand with instructions to grant the Motion to Quash.

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 1205, 1207 (Fla. 4th DCA 2005). 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); Hitt v. Homes & Land Brokers, Inc., 993 So. 2d 1162, 1165 (Fla. 2d DCA 2008).

Here, Basantes seeks review of an Order denying her Motion to Quash, wherein she also sought to abate the lower court action for lack of personal jurisdiction. She likewise challenges the lower court’s application and interpretation of Fla. Stat. 48.031(1)(a). In light of the cases cited above, the standard of review for the instant appeal is *de novo*.

I. THE LOWER COURT ERRED BY DENYING BASANTES’ VERIFIED MOTION TO QUASH SERVICE WHERE SHE WAS NOT INFORMED OF THE CONTENTS OF THE SUMMONS AND COMPLAINT.

The requirements for service of process are quite basic. Fla. Stat. § 48.031(1)(a) provides:

Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older **and informing the person of their contents.**

(emphasis added).

In Bache, Halsey, Stuart, Shields, Inc. v. Mendoza, the defendant challenged the sufficiency of service of process because the deputy sheriff did not inform her of the contents of the papers served upon her. 400 So. 2d 558, 559 (Fla. 3d DCA 1981). The lower court granted a motion to quash service and the Third District affirmed, ruling:

The deputy sheriff did not recall explaining to Mrs. Mendoza the contents of the papers he left. Mrs. Mendoza testified at her deposition that service consisted solely of a knock on the door, a man saying “Mendoza,” and delivery of papers, the contents of which she did not understand. Under these circumstances, we find no compliance with section 48.031(1), and we affirm the trial court’s order setting aside default judgment.

Id.

The facts at bar are materially indistinguishable. Here, Basantes established via a verified motion that the process server did not inform her of the contents of the Summons and Complaint, in violation of Fla. Stat. 48.031(1)(a). Appendix to Initial Brief, 3. BOA did not show differently, either via the Return of Service or otherwise. Appendix to Initial Brief, 2. As such, the lower court reversibly erred by denying the Motion to Quash.

The Return of Service was irregular on its face, as it did not indicate that the process server informed Basantes of the content of the papers being served.

Appendix to Initial Brief, 2. As such, it was BOA's burden to establish proper service. See Bennett v. Christina Bank & Trust Co., 50 So. 3d 43, 45 (Fla. 3d DCA 2010) ("Once a defect in the return of service is shown, the burden of demonstrating regular service is on the party seeking to invoke the court's jurisdiction."). BOA plainly failed to meet that burden.

Not informing Basantes of the content of the Summons and Complaint may seem like a technical defense. However, the statute is clear, and it is obviously in place for a reason. Here, for instance, Basantes was unaware of what had been served upon her (and was in the midst of loan modification discussions), so she did not respond to the Complaint, resulting in a clerk's default. Had Basantes not acted when she did (by retaining the undersigned and filing defensive motions), she was at risk of losing the case by default. Respectfully, lawsuits should not proceed on the merits when the defendant has not been informed of the contents of the papers being served upon them.²

The lower court did not explain why it denied the Motion to Quash.³ Regardless, the lower court was simply not permitted to arbitrarily ignore or reject uncontroverted evidence from Basantes. See Merrill Stevens Dry Dock Co. v. G &

² Of course, even if the lower court or this Court disagrees with this rationale, it is not the courts' prerogative to ignore a requirement set forth by the Florida legislature.

³ To its credit, the lower court recognized its ruling was appropriate for appellate review, as it granted Basantes' Emergency Motion for Stay Pending Appeal.

J Investments Corp., Inc., 506 So. 2d 30, 32 (Fla. 3d DCA 1987) (“We find error in the trial court’s rejection of Stevens’ un rebutted testimony that its president granted the nursing home a license which it subsequently revoked. Uncontradicted testimony must be accepted as proof of a contested issue.”); Moring v. Levy, 452 So. 2d 1069, 1070 (Fla. 3d DCA 1984) (“Moring claims that the evidence submitted during the trial concerning the extras was uncontroverted. ... We agree and find that the trial court erred in summarily denying all Moring’s claims for extras where a number of the claims were supported by uncontroverted evidence.”). Bacantes’ sworn assertion that she was not informed of the content of the Summons and Complaint should have been accepted as true, and the Motion to Quash should have been granted.

Absent valid service, the Motion to Quash should not have been denied. This Court should reverse.

CONCLUSION

In light of the foregoing, this Court should reverse the Order on review and remand with instructions to grant the Motion to Quash.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Monica L. Borne, Esq., Florida Foreclosure Attorneys, PLLC, 601 Cleveland Street, Suite 690, Clearwater, Florida 33755 on this ____ day of May, 2012.

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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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