FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1484

TERRA MAR PROPERTY MANAGEMENT, LLC, as Successor Trustee of the Duval County Land Trust #168143-4130,

Appellant,

v.

WILMINGTON SAVINGS FUND SOCIETY, FBS, d/b/a Christiana Trust, not individually but as Trustee for Pretium Mortgage Acquisition Trust; and Christie Engstrom, a/k/a Cristie Lynn Engstrom, a/k/a Cristie L. Engstrom,

Appellees.

On appeal from the Circuit Court for Duval County.
Waddell A. Wallace, Judge.

February 16, 2022

KELSEY, J.

Appellant, the current owner of a residence in Duval County, asserts only one issue: that because the original mortgagor gave

up all rights to the property in a bankruptcy proceeding, and then more than five years elapsed before Appellee, as successor to the original mortgagee, filed the current foreclosure action, the statute of limitations barred Appellee's foreclosure. *See* § 95.11(2)(c), Fla. Stat. (establishing five-year statute of limitations for foreclosure actions).

Because this is a legal issue, our standard of review is de novo. *BMG Realty Group, LLC v. U.S. Bank Nat'l Ass'n*, 291 So. 3d 165, 166 (Fla. 2d DCA 2020). We have carefully considered all of Appellant's arguments, but we reject them and agree with the Second and Fourth Districts' recent treatment of the same issues.

The Second District rejected a property owner's identical argument in *BMG Realty*. There, as here, a successor owner argued that the original borrowers' surrender of the property in bankruptcy accelerated the debt and triggered the five-year statute of limitations; and once the successor mortgagee failed to foreclose within that period, it lost any right to do so later—regardless of ongoing default. *Id*. at 166–68. As the Second District correctly reasoned, though, a continuing state of default creates a continuing window for acceleration and foreclosure. *Id.* at 166–67.

The Second District relied on *Bartram v. U.S. Bank National Association*, 211 So. 3d 1009 (Fla. 2016), which held that the statute of limitations does not bar a second "acceleration and foreclosure predicated upon subsequent and different defaults" after a first foreclosure action, acceleration, and dismissal. *Id.* at 1017 (quoting *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007 (Fla. 2004)); *see also id.* at 1019 (explaining the dismissal simply places the parties "back in the same contractual relationship as before, where the residential mortgage remained an installment loan, and the acceleration of the residential mortgage declared in the unsuccessful foreclosure action is revoked"). As the *Bartram* court explained, the installment nature of a mortgage continues until the debt is paid in full or a final judgment of foreclosure is entered. *Id*. at 1018–19.

The Second District in *BMG Realty* likewise rejected the second part of the argument presented both there and here: that surrender in bankruptcy not only relieves the debtor's liability but also eliminates the mortgagee's ongoing right to foreclose upon the

occurrence of future defaults. To the contrary, while surrender and discharge in bankruptcy relieve the debtor's personal liability, bankruptcy does not eliminate *in rem* liability or bar subsequent foreclosure after subsequent or ongoing defaults. *BMG Realty*, 291 So. 3d at 167. In short, a mortgagor's surrender and discharge in bankruptcy do not eliminate the debt itself, nor the mortgagee's future right to foreclose against the property to collect that debt. The debtor can be freed from the debt, but that does not convey a free house. *See Nationstar Mortg., LLC v. Brown*, 175 So. 3d 833, 834 (Fla. 1st DCA 2015) ("[A] note securing a mortgage creates liability for a total amount of principal and interest, and [] the lender's acceptance of payments in installments does not eliminate the borrower's ongoing liability for the entire amount of the indebtedness."); *see also Bartram*, 211 So. 3d at 1018 (approving and quoting *Brown*, 175 So. 3d at 834).

Likewise, in *Can Financial, LLC v. Krazmien*, 253 So. 3d 8 (Fla. 4th DCA 2018), where the original mortgagor asserted the arguments also presented here, the Fourth District held that bankruptcy does not trigger a single five-year statute of limitations where defaults continue. *Id*. at 11. Rather, continuing defaults after a borrower's discharge in bankruptcy properly formed the basis of a future foreclosure action against a subsequent owner. *Id*. The court explained that the "creditor's right to foreclose on the mortgage survives or passes through the bankruptcy," and that after a discharge the bank might not want to foreclose or dispossess the debtor, the debtor can continue to make periodic payments to discourage the bank from foreclosing, and the Bankruptcy Code specifically empowers the bank to accept those payments in lieu of foreclosure. *Id.* at 10–11 (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991); *Alvarez v. Bank of Am. Corp.*, No. 14-CV-60009-KAM, 2015 WL 12670510, at *2–4 (S.D. Fla. Apr. 17, 2015) (rejecting borrower's claim that discharge constituted a default on the entire mortgage thus beginning the statute of limitations, and finding no evidence bank had accelerated the loan)). Finally, the court found the terms of the mortgage remained intact after discharge; thus, every subsequent missed payment constituted a default triggering a new statute of limitations period. *Krazmien*, 253 So. 3d at 11.

Accordingly, Appellant, as a subsequent owner of the property (having purchased it for pennies on the dollar at a homeowners' association's junior-lienholder foreclosure), took it subject to the mortgagee's ongoing rights, unaffected by the bankruptcy surrender or discharge. We therefore affirm the final judgment of foreclosure.

AFFIRMED.

OSTERHAUS and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Bradley R. Markey and Ryan T. Hyde of Thames Markey, P.A., Jacksonville, for Appellant.

Gennifer L. Bridges of Burr & Forman, LLP, Orlando; Jacqueline A. Simms-Petredis of Burr & Forman, LLP, Tampa, for Appellee Wilmington Savings Fund Society.

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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

DAVID M. SANTIAGO,

Appellant,

v.

Case No. 5D20-2485
LT Case No. 2018-CA-005130-O

WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF MFRA TRUST 2015-1, CARRIE SANTIAGO A/K/A CARRIE A. SANTIAGO, AND SPACELY SPACE SPROCKETS INVESTMENTS, LLC,

Appellees.
_____/

Opinion filed February 18, 2022

Appeal from the Circuit Court
for Orange County,
John M. Kest, Judge.

Andrew B. Greenlee, of Andrew B. Greenlee, P.A., Sanford, and Anthony N. Legendre, II, of Law Offices of Legendre & Legendre, PLLC, Maitland, for Appellant.

Shaib Y. Rios, of Brock & Scott, PLLC, Ft. Lauderdale, for Appellee, Wilmington Trust, National Association.

No Appearance for Other Appellees.

LAMBERT, C.J.

David M. Santiago appeals the order entered by the trial court after an evidentiary hearing that denied his omnibus motion to: (1) quash constructive service of process; (2) set aside the final judgment of foreclosure; (3) vacate the default entered by the clerk of court; and (4) vacate the certificate of sale and certificate of title issued following the foreclosure sale. For the following reasons, we reverse the order in its entirety.

BACKGROUND—

On May 16, 2018, Appellee's predecessor-in-interest, Wells Fargo Bank, N.A., ("Wells Fargo"), filed a verified complaint against Santiago to foreclose a mortgage on residential real property owned by him and his ex-wife in Orlando, Florida. Efforts were made by Wells Fargo shortly after suit was filed to personally serve Santiago with process at the subject residence, as well as at other locations, as indicated in the July 9, 2018 affidavit of diligent search and inquiry from the process server who had been hired on behalf of Wells Fargo to serve Santiago. Subsequently to the execution of this affidavit, no additional efforts were made to personally serve Santiago.

In April 2019, nine months after the process server had executed his aforementioned affidavit, Wells Fargo's counsel executed and filed his own "Affidavit for Service by Publication." Counsel attached to his affidavit the earlier affidavit from the process server. Counsel also averred in his affidavit that, according to the process server's affidavit, Santiago's residence is "unknown" and that counsel was unable to determine if Santiago "is living or dead." Wells Fargo thereafter caused a notice of action to be published.

After Santiago failed to file a response to the complaint, Wells Fargo moved for and obtained a default against Santiago from the clerk of court. It then moved for the entry of a final summary judgment of foreclosure, which was granted following a hearing.[1] The mortgaged property was thereafter sold at foreclosure sale to a third-party purchaser, to whom the clerk of court issued a certificate of title.

Ten days after the certificate of title issued, Santiago filed the subject motion, with supporting affidavit, challenging the sufficiency of the affidavit for service of process by publication and detailing how, in his view, Wells Fargo had failed to conduct a diligent search to locate and personally serve him with process before resorting to service by publication. Santiago argued

[1] Santiago was not present at the summary judgment hearing. The trial court also granted a motion substituting Appellee for Wells Fargo as the plaintiff.

that, resultingly, service of process against him was defective, the clerk's default should be set aside as improvidently entered, the later final judgment of foreclosure was void, and the certificates of sale and title issued following the court-ordered foreclosure sale should be vacated. Following an evidentiary hearing, the trial court entered the unelaborated written order now under review, denying Santiago's motion. This appeal ensued.

ANALYSIS—

We begin our analysis with the recognition that, under sections 49.011(1) and 49.021(1), Florida Statutes (2019), service of process upon any known natural person in a mortgage foreclosure proceeding can be obtained through publication, provided that it is first shown that personal service of process cannot be had. Thus, Appellee's predecessor, Wells Fargo, was not precluded from serving process on Santiago by publication; however, "[b]ecause the lack of personal service implicates due process concerns, a plaintiff must strictly comply with the statutory requirements [before serving process by publication]." *Martins v. Oaks Master Prop. Owners Ass'n*, 159 So. 3d 142, 146 (Fla. 5th DCA 2014) (quoting *Redfield Invs., A.V.V. v. Vill. of Pinecrest*, 990 So. 2d 1135, 1138 (Fla. 3d DCA 2008)).

The statutory requirements for obtaining valid service of process by publication on a natural person are set forth in section 49.041, Florida

Statutes. Prior to serving process by publication, this statute requires that, among other things, the plaintiff, or his or her agent or attorney, provide a sworn statement showing "[t]hat diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant."[2] § 49.041(1), Fla. Stat. A failure by the plaintiff to strictly adhere to the requirements of section 49.041 results in the trial court lacking jurisdiction over the defendant. *See Shepheard v. Deutsche Bank Tr. Co. Ams.*, 922 So. 2d 340, 343 (Fla. 5th DCA 2006) ("The failure to strictly adhere to the statutes' requirements deprives the court of jurisdiction over the defendant improperly served." (citing *Anthony v. Gary J. Rotella & Assocs., P.A.*, 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005))).

Where, as here, the validity of the service of process by publication is disputed, a trial court, in determining whether such service was properly

[2] The statute also requires that the sworn statement indicate: whether the person is over or under the age of eighteen years, if his or her age is known, or that the person's age is unknown; and that the residence of the person is either unknown to the affiant, in some state or county other than Florida, stating the residence if known, or that the residence of the person is in Florida, but that the person has either been absent for more than sixty days preceding the making of the sworn statement, or is concealing themselves so that process cannot be personally served, and that the affiant believes that there is no person in Florida upon whom service of process would bind the absent or concealed defendant. *See* § 49.041(2)–(3), Fla. Stat.

obtained, is tasked with resolving: (1) whether the affidavit of diligent search filed pursuant to section 49.041 is legally sufficient and (2) if the plaintiff actually conducted an adequate search to locate the defendant. *Martins*, 159 So. 3d at 146 (quoting *First Home View Corp. v. Guggino*, 10 So. 3d 164, 165 (Fla. 3d DCA 2009)). In deciding if a diligent search and inquiry to locate a defendant for personal service was performed, a trial court must evaluate whether the plaintiff "reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant." *Id.* (quoting *McDaniel v. McElvy*, 108 So. 820, 831 (Fla. 1926)).

At the hearing held on Santiago's motion, the uncontroverted evidence presented to the trial court, consisting of emails, Wells Fargo's own records, and testimony from both Santiago and a representative of Wells Fargo's loan servicer, indicated that during the time from June 2018, when Wells Fargo attempted personal service of process on Santiago,[3] through April 2019, when Wells Fargo's attorney filed his affidavit as the prerequisite for service of process by publication, that Wells Fargo and Santiago were in direct

[3] We also note that the process server who executed the July 9, 2018 affidavit that was relied upon or used by Wells Fargo in April 2019 in support of serving process on Santiago by publication did not testify at this hearing.

communication. More specifically, Wells Fargo representatives and Santiago were having phone conversations and emails with each other about loss mitigation and other matters.

Despite these communications, when Wells Fargo ultimately decided in April 2019 to effectuate service of process on Santiago by publication, it made no effort to advise Santiago that it had previously filed the foreclosure suit, nor did it attempt to contact him regarding service of process. Under these specific circumstances, we conclude that a diligent search to personally locate Santiago just prior to serving him with process by publication was not performed. *See Miller v. Partin*, 31 So. 3d 224, 228 (Fla. 5th DCA 2010) (recognizing that, while exceptions might exist, when a plaintiff seeks to serve an individual with process by publication, a diligent search and inquiry would include talking to the neighbors or trying to contact the person to be served by phone or by mail); *Shepheard*, 922 So. 2d at 344 ("In a mortgage foreclosure action, one obvious step in a diligent search is to research mortgage servicing records." (citing *Reina v. Barnett Bank, N.A.*, 766 So. 2d 290, 291 (Fla. 4th DCA 2000))). Stated somewhat differently, Wells Fargo, being in contemporaneous, direct communication with Santiago, did not exert the requisite "honest and conscientious effort appropriate to the circumstances to acquire the information necessary" to

effect personal service upon Santiago. *See Martins*, 159 So. 3d at 146 (quoting *McDaniel*, 108 So. at 831).

We further conclude that reversal is warranted because the affidavit for service by publication prepared and filed by counsel for Wells Fargo was legally insufficient for being patently inaccurate. *See id.* at 147 (reversing the trial court's order denying the appellant's motion to vacate the final judgment of foreclosure, void the foreclosure sale, vacate the default, and quash service of process when the plaintiff's affidavit of diligent search was "patently inaccurate"). As previously indicated, counsel swore that, according to the July 2018 affidavit of the process server, Santiago's residence was "unknown." Counsel also averred that he was unable to determine if Santiago was living or dead.

However, again, the uncontradicted evidence at the hearing held on Santiago's motion showed that during April 2019, when Wells Fargo's counsel filed his affidavit and attempted to serve Santiago by publication, a Wells Fargo representative was communicating directly with Santiago by phone and by email and was aware that Santiago's residence was the mortgaged property.[4] *See Benavente v. Ocean Vill. Prop. Owners Ass'n*,

[4] Santiago also maintained throughout this proceeding that, as evidenced by the respective records of the Orange County Tax Collector and

260 So. 3d 313, 317 (Fla. 4th DCA 2018) (concluding that the affidavit for service by publication was facially defective for being "patently inaccurate" when it failed to disclose that the plaintiff was aware of the defendant's residential address); *Godsell v. United Guar. Residential Ins.*, 923 So. 2d 1209, 1215 (Fla. 5th DCA 2006) (finding that a final judgment of foreclosure was void where the constructive service on the defendant was ineffective due to the plaintiff's failure to perform a diligent search and the failure of the affidavit of diligent search to include, inter alia, any reference to the defendant's possible Canadian address).

Accordingly, we reverse the order denying Santiago's motion and remand with directions to the trial court to vacate the clerk's default, the final judgment of foreclosure, and the certificates of sale and title.

REVERSED and REMANDED, with directions.

WALLIS, J., and SAWAYA, T.D., Senior Judge, concur.

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the Property Appraiser that were presented at the hearing, the mortgaged property was, at all times pertinent, his homestead and his residence.

Third District Court of Appeal

State of Florida

Opinion filed February 16, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-0299
Lower Tribunal Nos. 18-28554 CC & 20-266 AP

Max Tafel Selman,
Appellant,

vs.

Progressive American Insurance Company,
Appellee.

An Appeal from the County Court for Miami-Dade County, Elijah A. Levitt, Judge.

George A. David, P.A., and George A. David, for appellant.

Kubicki Draper, P.A., and Valerie Dondero and Barbara E. Fox, for appellee.

Before FERNANDEZ, C.J., and SCALES and GORDO, JJ.

SCALES, J.

Max Tafel Selman ("Insured"), the plaintiff below, appeals from a July 22, 2020 order granting Progressive American Insurance Company's ("Progressive") post-judgment motion that Progressive labeled its "Motion to Enforce Settlement and Compliance with the Court's March 20, 2020 Order" ("Progressive's Motion"). The trial court entered the challenged order having previously entered a March 20, 2020 final judgment that had reserved jurisdiction to further enforce the terms of the parties' settlement agreement. We reverse because, by adjudicating Progressive's Motion and entering the challenged order, the trial court exceeded the limited continuing jurisdiction the trial court had reserved in its final judgment.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

In November 2018, Insured was involved in an automobile accident that totaled his vehicle that was insured by Progressive. While Progressive agreed that the loss was covered under its policy and that there was a total loss, the parties disagreed as to the value of the loss.

On December 21, 2018, Insured filed this first party insurance action against Progressive in the Miami-Dade County county court, seeking policy benefits for the covered loss. A year later, at a subsequent court-ordered appraisal, the parties reached a settlement agreement wherein the parties agreed *only* that the actual cash value of Insured's vehicle was $10,834

"[b]efore, [t]ax, title, deductible or any statutory or contractual fees" and that "[t]his claim is hereby settled and closed." These terms are reflected in a one-page agreement, dated December 18, 2019, executed by the parties' respective counsel.

On January 21, 2020, Insured filed in the county court action a motion to enforce the parties' December 18, 2019 settlement agreement. Progressive did not file a response. On March 11, 2020, the trial court held a hearing on Insured's motion, but the record contains no hearing transcript. On March 20, 2020, the trial court entered its final judgment that granted Insured's motion to enforce the parties' settlement agreement. Therein, the trial court ordered *only* that Progressive pay Insured the agreed $10,834 settlement amount plus $181.65 in statutory interest. The final paragraph of the final judgment states:

> The Court further finds that the judicial labor in this matter is complete for which this Court issues this Final Judgment closing the case. [Progressive] shall pay [Insured] in accordance with the settlement agreement and this order. The Court reserves jurisdiction to determine entitlement to, and amount of, attorney fees and costs in this matter and to enforce the terms of this Order and the settlement agreement.

Following the trial court's entry of the final judgment, Progressive neither filed a Florida Rule of Civil Procedure 1.530 motion for rehearing of the final judgment nor sought to appeal the final judgment. Instead,

Progressive complied with the final judgment and, pursuant to the final judgment, issued payment to Insured.

Forty-one days after the final judgment was rendered and twenty days after making payment to Insured pursuant to the final judgment, Progressive filed Progressive's Motion. In Progressive's Motion, Progressive informed the trial court, for the first time, that on February 25, 2020 – two weeks prior to the hearing on Insured's motion to enforce the parties' settlement agreement and about a month prior to the entry of the final judgment – Progressive had paid $10,031.17 to the lienholder of Insured's vehicle.[1] Progressive's Motion argued, that, in light of Progressive's February 25, 2020 payment to Insured's lienholder, Progressive's payment to Insured pursuant to the final judgment resulted in a windfall for Insured, and the trial court should order Insured to repay Progressive.

Following a hearing on Progressive's Motion, on July 22, 2020, the trial court entered the challenged order requiring Insured to repay $10,031.17 of the $10,834 amount that Progressive had paid to Insured pursuant to the final judgment. After the lower court denied Insured's motion for rehearing, Insured timely appealed the challenged order.

II. STANDARD OF REVIEW

[1] The $10,031.17 figure satisfied the lien on Insured's vehicle.

"A settlement agreement is contractual in nature and therefore interpreted and governed by contract law. We therefore review de novo the trial court's order interpreting the Settlement Agreement." Platinum Luxury Auctions, LLC v. Concierge Auctions, LLC, 227 So. 3d 685, 688 (Fla. 3d DCA 2017) (citation omitted). The extent to which a trial court has reserved jurisdiction in a final judgment is also a pure question of law that we review de novo. See Cent. Mortg. Co. v. Callahan, 155 So. 3d 373, 375 n.2 (Fla. 3d DCA 2014).

III. ANALYSIS

While Insured makes several arguments on appeal, we address the dispositive argument of whether the trial court, in its final judgment, retained the jurisdiction to adjudicate Progressive's Motion and grant the relief contained in the challenged order. "When a trial court approves a settlement agreement and retains jurisdiction to enforce its terms, the trial court has the jurisdiction to enforce the terms of the settlement agreement." Platinum Luxury Auctions, LLC, 227 So. 3d at 688. "[T]he extent of the court's continuing jurisdiction to enforce the terms of the settlement agreement is circumscribed by the terms of that agreement." Id. (quoting Paulucci v. Gen. Dynamics Corp., 842 So. 2d 797, 803 (Fla. 2003)). Where the trial court grants relief *beyond* the terms of the settlement agreement, the court

exceeds the jurisdiction the court reserved for itself. Id.; see also Ross v. Wells Fargo Bank, 114 So. 3d 256, 257 (Fla. 3d DCA 2013) (concluding that a trial court acts without authority by awarding post-judgment relief not contemplated by the final judgment).

Without question, by entering the challenged order, the trial court was trying to accomplish equity. Nonetheless, despite such good intentions, given the facts of this case, we are compelled to conclude that the trial court exceeded its jurisdiction by awarding post-judgment relief that was beyond the terms of the parties' settlement agreement and not contemplated by the final judgment. Nothing in the settlement agreement addressed, nor did anything in the final judgment contemplate, Progressive's unliteral payment to the lienholder, much less Insured reimbursing Progressive for this payment.

Indeed, the settlement agreement did not include any mention of a payment to a lienholder, and the final judgment could not have contemplated a requirement for Insured to repay Progressive for such payment because the trial court was not informed that Progressive had made its lienholder payment until forty-one days *after* the final judgment was rendered. Hence, irrespective of how it may have been captioned, Progressive's Motion did not seek an adjudication related to the enforcement of the parties' settlement

agreement or any provision of the final judgment. Simply put, Progressive's Motion sought to vacate the final judgment and, by the time Progressive's Motion was filed, the trial court had lost jurisdiction to revisit its final judgment. See Herskowitz v. Herskowitz, 513 So. 2d 1318, 1319 (Fla. 3d DCA 1987) ("[O]nce a judgment becomes final – as where (a) a final judgment has been entered, and (b) a motion for rehearing under 1.530 has been denied or no such motion is filed and the [time] for filing same has expired – the trial court loses jurisdiction to rehear the judgment on the merits."). The limited jurisdiction reserved in the final judgment did not include adjudicating, and granting relief upon, the issue raised in Progressive's Motion.

To interpret the final judgment's reservation of jurisdiction provision otherwise would not only be contrary to the terms of the parties' settlement agreement and the language of the final judgment, but it would undermine both the finality of judgments and the purpose for including such reservation of jurisdiction provisions in judgments.[2] Accordingly, we find that the trial

[2] To the extent Progressive claims that the parties' written settlement agreement did not constitute the full agreement in light of events that transpired subsequent to its execution by the parties' respective counsel, Progressive should have timely moved for rehearing of the final judgment in the lower court and, if necessary, appealed from the final judgment. Progressive did neither.

court's July 22, 2020 order requiring Insured to repay Progressive exceeded the jurisdiction the trial court reserved for itself in the final judgment. We, therefore, reverse the challenged order and remand for further proceedings consistent with this opinion.[3]

Reversed and remanded.

[3] Expressing no opinion on the merits of any such motion or claim, we note that our decision is without prejudice to Progressive timely filing a Florida Rule of Civil Procedure 1.540 motion below or pursuing a separate recoupment action against Insured.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JG CONTRACTING COMPANY, INC.,
Appellant,

v.

TOWER INNOVATIONS DISTRIBUTION, LLC,
Appellee.

No. 4D21-442

[February 16, 2022]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; James L. Martz, Judge; L.T. Case No. 502019CA005665MB.

Craig A. Goddy and Bradley S. Donnelly of Goddy & Donnelly, PLLC, Naples, for appellant.

Craig A. Tompkins of Craig Tompkins, PLLC, Boca Raton, for appellee.

PER CURIAM.

JG Contracting Company, Inc. (defendant) seeks review of a final default judgment entered against it after being sued on a breach of contract complaint filed by Tower Innovations Distribution, LLC (plaintiff). The trial court entered the default judgment without ruling on the defendant's pending motion to dismiss for lack of jurisdiction. We reverse because the trial court erred in entering the default judgment before determining if it had personal jurisdiction over the defendant.

Background

The plaintiff alleged in its complaint that "a substantial part of the events and/or omissions giving rise to Plaintiff's claims occurred in Palm Beach County, Florida [where the] Defendant has systematic contacts and regularly conducts business" and that "[a]t all times relevant hereto, Defendant has been doing business within the State of Florida."

Because the defendant failed to respond to the complaint, the clerk entered a default. Before the trial court entered the final default judgment,

the defendant filed a motion to dismiss for lack of personal jurisdiction. In support of its motion, the defendant filed sworn affidavits asserting that it was headquartered in Pennsylvania and it never conducted business, bid upon, or pursued any construction projects in Florida. The affidavits also asserted that the defendant did not contract with or pay any subcontractors in Florida. Moreover, the affidavits asserted that the defendant's interactions with the plaintiff were all conducted in either Pennsylvania or Indiana.

Despite the irreconcilable allegations, the trial court entered a default final judgment for the plaintiff before determining if it had personal jurisdiction over the defendant. Thereafter, the trial court summarily denied the defendant's motion to dismiss for lack of personal jurisdiction based on its prior entry of the default judgment.

Analysis

We review a trial court's ruling on a motion to dismiss for lack of personal jurisdiction de novo. *Wendt v. Horowitz*, 822 So. 2d 1252, 1256-57 (Fla. 2002) (citing *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 584 (Fla. 2000)).

The plaintiff's complaint alleged that "a substantial part of the events and/or omissions" related to the claim took place in Palm Beach County. This allegation suggests the plaintiff sought to assert specific jurisdiction over the non-resident defendant based on our state's long-arm statute established in section 48.193(1)(a), Florida Statutes (2018). The plaintiff's complaint also alleged that "Defendant has systematic contacts and regularly conducts business in Palm Beach County, Florida." This allegation suggests that the plaintiff also sought to assert general jurisdiction over the defendant based on section 48.193(2) of the long-arm statute, which provides for jurisdiction over a non-resident "who is engaged in substantial and not isolated activity within the state … whether or not the claim arises from that activity." § 48.193(2), Fla. Stat. (2018).

We have articulated a two-prong test for determining jurisdiction over a non-resident. "The court must first determine whether the plaintiff alleged sufficient facts to comply with Florida's long-arm statute" and "[n]ext, the court must determine if the defendant had sufficient minimum contacts with the State of Florida to satisfy due process." *Russo v. Fink*, 87 So. 3d 815, 818 (Fla. 4th DCA 2012) (citing *Joseph v. Chanin*, 869 So. 2d 738, 740 (Fla. 4th DCA 2004)).

General jurisdiction requires sufficient facts showing substantial and non-isolated activity within the State as established by section 48.193(2). "The standard for an exercise of general personal jurisdiction is a much higher standard [than for specific jurisdiction]." *Glovegold Shipping, Ltd. v. Sveriges Angfartygs Assurans Forening*, 791 So. 2d 4, 11 (Fla. 1st DCA 2000). "The court must find that the defendant's contacts with the forum represent continuous and systematic general business contacts." *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

While the plaintiff's complaint contained conclusionary allegations that recite the statutory requirements for both specific and general long-arm jurisdiction against the defendant, the complaint's factual allegations belie the plaintiff's conclusionary allegations. The complaint itself concedes that the defendant is incorporated and headquartered in Pennsylvania and that the subject contract was for a project located in Maryland. Moreover, the invoice attached to the complaint contains no Florida address. Instead, the invoice shows the plaintiff with an Indiana address and directs the defendant to send payment for the subject contract to Minnesota.

The defendant filed affidavits pursuant to the procedure established by our supreme court for contesting personal jurisdiction. *See Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989) ("A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his [or her] position."). Upon filing the affidavits disputing the jurisdictional allegations in the complaint, the burden shifted to the plaintiff "to prove by affidavit the basis upon which jurisdiction may be obtained." *Id.* If the "affidavits cannot be reconciled" the trial court must "hold a limited evidentiary hearing in order to determine the jurisdiction issue." *Id.* at 503.

Relying upon the default judgment, the plaintiff did not file any opposing affidavits. However, "[a] judgment that is entered against a defendant over whom the court lacks personal jurisdiction is a void judgment." *Wiggins v. Tigrent*, Inc., 147 So. 3d 76, 81 (Fla. 2d DCA 2014). Moreover, "[d]ue process requires that the circuit court must have first acquired jurisdiction . . . before it could contemplate entering an in personam judgment against [a defendant]." *Id.* at 84. Thus, we conclude that the trial court erred in entering the default judgment before determining if it had jurisdiction over the defendant.

Conclusion

Accordingly, we reverse and remand for the trial court to vacate its prematurely entered default judgment and provide the plaintiff an opportunity to respond to the defendant's affidavits. If the affidavits cannot be reconciled, the trial court shall hold an evidentiary hearing to determine if it had jurisdiction over the defendant.

Reversed and remanded with instructions.

WARNER, GERBER and ARTAU, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Third District Court of Appeal

State of Florida

Opinion filed February 16, 2022.
Not final until disposition of timely filed motion for rehearing.

No. 3D21-0611
Lower Tribunal No. 20-8083

Aliner J. Harris,
Appellant,

vs.

HGA-Land Holdings, LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Oscar Rodriguez-Fonts, Judge.

Aliner J. Harris, in proper person.

Tepps Treco and William A. Treco (Plantation), for appellee.

Before LINDSEY, MILLER and LOBREE, JJ.

PER CURIAM.

Upon our de novo review, we affirm the trial court's entry of final

summary judgment quieting title and partitioning property pursuant to sections 733.105(3), 64.051, and 64.071, Florida Statutes (2021). The partial record before us lacks a transcript of the hearing and does not reflect the filing of any response or affidavit in opposition to the summary judgment motion below. "It is the responsibility of the appellant to ensure that a record adequate to permit resolution of the issues raised on appeal is prepared and transmitted to the appellate court." Morgan v. Pake, 611 So. 2d 1315, 1316 (Fla. 1st DCA 1993) (citing Fla. R. App. P. 9.200(e)); see Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) (explaining that "[i]n appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error," so "the lack of a trial transcript or a proper substitute" results in record that is "inadequate to demonstrate reversible error" and requires affirmance); Butler v. Metropolitan Dade County, 298 So. 2d 552, 552-53 (Fla. 3d DCA 1974) (affirming final summary judgment because material portions of record upon which trial court based its findings were omitted on appeal); see also Kidwell v. Kidwell, 181 So. 3d 1190, 1190 (Fla. 3d DCA 2015) ("Notwithstanding the fundamental principle of allowing pro se litigants procedural latitude, a practice effected to ensure access to the courts for all citizens, pro se litigants are not immune from the rules of

procedure." (quoting Barrett v. City of Margate, 743 So.2d 1160, 1162 (Fla. 4th DCA 1999))).

Affirmed.