IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CIVIL DIVISION

NATIONAL CITY BANK SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE CO.,

CASE NO. 09-2466-CA

PLAINTIFF,

v.

MARCO V. DECINTI AND DARLENE DECINTI,

DEFENDANTS.
_____/

DEFENDANTS' VERIFIED EMERGENCY MOTION TO QUASH SERVICE/ MOTION TO VACATE FINAL JUDGMENT/ MOTION TO CANCEL FORECLOSURE SALE

COMES NOW the Defendants MARCO V. DECINTI and DARLENE DECINTI (hereinafter "Defendants"), by and through undersigned counsel, and files this VERIFIED EMERGENCY MOTION TO QUASH SERVICE, TO VACATE FINAL JUDGMENT, and TO CANCEL FORECLOSURE SALE, pursuant to Rule 1.540(b), Fla. R. Civ. Pro., and precedent case law, and as grounds therefore would state as follows:

FACTS

1. This is an action for foreclosure of homestead real property owned by the Defendants.

2. The named Plaintiff in this case is NATIONAL CITY BANK SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE CO. (hereinafter "Plaintiff"). The Plaintiff initiated this action when it filed its Complaint on or about April 29, 2009.

3. The Plaintiff alleges that Substitute Service was effectuated on the Defendants Marco Deciniti and Darlene Decinti (Husband and Wife) when a process server handed to their adult son, three copies of the subject lawsuit along with three original summonses issued by this court.

For the reasons detailed herein, the Defendants attack the validity of service of process in this complaint and specifically deny that proper service has been effectuated upon Darlene Decinti.

I. THE UNEXPLAINED EXISTENCE OF TWO "ORIGINAL" JOHN DOE SUMMONS

4. In the possession of your undersigned counsel are two "original" summons issued in the name of JOHN DOE. However, only one summons is an actual original issued by the Clerk of the Court; the other is a high-quality color photo static copy. While this high-quality copy of the JOHN DOE summons may appear to be an original summons issued by the Clerk of the Court, a closer examination of the purported original summons reveals, even to the untrained eye, the summons to be a photo static copy made to resemble an original summons. Unadulterated copies of the original and the purported original JOHN DOE summons are attached hereto and incorporated as Exhibit "A".

5. Defendants' Exhibit "B" includes marked-up copies of the original and the purported original JOHN DOE summonses. The marked-up copies reveal how the original JOHN DOE summons as issued by the Clerk of the Court is identical in nature to the high-quality photo static copy. This includes: (Hold both copies one on top of another and look up towards a bright light source)

a. The fact that the date is raised above the "date" line by the exact same amount on both summonses;

b. The fact that the first "0" in both date lines bleeds out identically in the upper right corner of the number on both summonses;

c. The fact that the deputy clerk's signature is raised above the "by" line by the exact same amount on both summonses;

d. The fact that the "J" in the deputy clerk's signature is placed in the exact same spot on both summonses; and

e. The fact that the seal of the Clerk of the Court is placed in the exact same spot on both summonses.

6. Your undersigned can conceive of no legitimate explanation for the existence of the second color copy "original" JOHN DOE summons. Your undersigned has spoken at length with Joan L. Mackey, the Deputy Clerk that issued the Summons (941-505-4774) and with Susan J. Spoonts, (941-628-1510) the agency that is alleged to have served the summons, but neither can offer any legitimate explanation for the existence of the second color copy JOHN DOE summons. It is respectfully suggested that, at a minimum, this court should hold an evidentiary hearing, examine the second JOHN DOE summons in order to determine some legitimate explanation for its existence.

II. THE UNEXPLAINED EXISTENCE OF A THIRD JOHN DOE SUMMONS

7. On information and belief, this court issued only one JOHN DOE summons, however, the JOHN DOE summons returned by process server Spoonts to the Clerk of Court is a Third JOHN DOE SUMMONS which is different than either of the two which were described above. Your undersigned cannot understand how yet a third JOHN DOE summons exists which has been filed with the court and which purports to provide evidence of Service of Process on the Defendants in this case.

III. NO SUMMONS OF ANY KIND WAS DELIVERED TO DARLENE DECINTI AND THEREFORE NO SERVICE HAS BEEN EFFECTED UPON HER

8. While the Plaintiff has alleged that Defendant DARLENE DECINTI was personally served and a return of service of a summons issued to her has been filed with the court, no summons issued to Darlene Decinti was served on her personally or through substitute service.

The only summons substitute served on the Defendant's adult son were 1) Summons to MARCO V. DECINTI; 2) Actual Original Summons issued to JOHN DOE; 3) "Fake" Original Summons issued to JOHN DOE. These three documents and the complaint attached are in the possession of Defendants. No other summons or complaint was served on the Defendants and in particular, no Summons issued to Darlene Decinti was ever served upon her personally or through substitute service. Accordingly, Defendant Darlene Decinti specifically denies that service has been effectuated upon her and therefore asserts that the Final Judgment of Foreclosure filed in this case if VOID AB INITITIO as to her interest in the subject property. Mrs. Decinti has never filed a responsive pleading to the Plaintiff's Complaint; therefore, the issue of service has not been waived.

9. Finally, while the Plaintiff has filed a purported "original" note, the Defendants objected to the introduction of this note claiming that it was not the original note that they had signed. More importantly, **the original note was introduced the day of the summary judgment hearing, thus violating the Florida Rules of Civil Procedure**. At a minimum, the Defendants were estopped from examining the purported original note until the very day of the hearing.

STANDARD OF REVIEW

10. Fla. R. Civ. Pro. 1.540(b) provides, in pertinent part that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons….mistake, inadvertence, surprise, or excusable neglect."

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION

I. The Defendants' motions should be granted because the Clerk of the Court did not sign both JOHN DOE summonses

a. Legal Standards

11. "**In order for a summons to be issued and to be effective** as a means by which a party is brought into Court to answer a complaint, it is not only necessary that the forms be filled out giving the necessary information, but after this is done, **it must be signed by the issuing officer or his duly authorized deputy in order to give it authenticity**." Ball v. Jones, 65 So. 2d 3 (Fla. 1953). *Bold emphasis added*.

12. In Ball, *supra*, the Florida Supreme Court held that because a so-called summons was not signed, said summons was void. Id at 5. The Court thereafter quashed service against the Defendant. Id.

b. Argument

13. Here, there are various defects with the JOHN DOE summonses which warrants, at a minimum, the vacating of the Final Judgment entered against the Defendants and an evidentiary hearing on the authenticity of the summonses.

14. Specifically, the Defendants are in possession of two "original" JOHN DOE summonses, both of which were purportedly signed by the Clerk of the Court. However, only one summons was actually signed by the Court and the other is a high-quality color photostatic copy.

15. As discussed above, the high-quality copy is a virtual identical of the original JOHN DOE summons issued by the Clerk of the Court. Defendants' Exhibit "B" clearly reveals how the original JOHN DOE summons and the high-quality copy are identical in nature to each other.

16. Therefore, the JOHN DOE summons is, as the Florida Supreme Court in Ball, *supra*, noted, void on its face. The Final Judgment entered against the Defendants was therefore a mistake and should be vacated and an evidentiary hearing into the authenticity of the JOHN DOE summonses should be ordered.

WHEREFORE, based upon the foregoing, the Defendants respectfully request this Court quash service, vacate the Final Judgment entered against them, cancel the foreclosure sale, order an evidentiary hearing into the authenticity of the JOHN DOE summonses, and any other relief the Court deems just and proper.

II. The Defendants' motions should be granted because Mrs. Decinti was never personally served and because the issue of service has not been waived

a. Legal Standards

17. Fla. Stat. §48.031(1)(a), which sets forth the requirements for service of process, 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.

18. Strict compliance with the statutory provisions governing service of process is required in order to obtain jurisdiction over a party. *See* Schupak v. Sutton Hill Assocs., 710 So.2d 707 (Fla. 4th DCA 1998); Sierra Holding, Inc. Inn Keepers Supply Co., 464 So.2d 652 (Fla. 4th DCA 1985); Baraban v. Sussman, 439 So.2d 1046 (Fla. 4th DCA 1983).

19. The strict observance is required in order to assure that a defendant receives notice of the proceedings filed. *See* Electro Eng'g Products Co., Inc. v. Lewis, 352 So.2d 862 (Fla. 1977). *See also* Haney v. Olin Corp., 245 So.2d 671 (Fla. 4th DCA 1971) (providing that "the major purpose of the constitutional provision which guarantees 'due process' is to make certain that when a person is sued he has notice of the suit and an opportunity to defend.").

20. "**[S]trict compliance [with Florida statutory provisions] is required, the failure to comply with the statutory terms means that service is defective, resulting in a failure to**

acquire jurisdiction over the defendant." Vidal v. Suntrust Bank, 4D09-3019 (Fla. 4th DCA 2010). *Bold emphasis added*.

21. Further, it is not for the court to disregard the specific statutory language, the trial court erred in denying the motion to quash service when the service of process fails to comply with the statutory requirements. Id.

22. The fact that a defendant later finds out about a lawsuit after defective service does not cure the defective service. Courts have consistently held that insufficient service of process is reversible error even where defendant received actual notice of the lawsuit. *See* Cheshire v. Birenbaum, 688 So.2d 430 (Fla. 3rd DCA 1997) ("Service…was thus legally defective, even though he received actual notice of the suit filed").

23. Pursuant to Fla. R. Civ. Pro. 1.100, there are only seven types of filings which constitute a pleading: (1) a complaint, (2) an answer, (3) an answer to a counterclaim, (4) an answer to a crossclaim, (5) a third-party complaint, (6) a third-party answer, and (7) a reply.

24. Finally, "[o]ne who holds legal title to mortgaged property is an indispensable party defendant in a suit to foreclose a mortgage and a court cannot properly adjudicate the matters involved in [foreclosure lawsuits] when it appears [that] indispensable parties are not in some proper way actually or constructively before the court." Davanzo v. Resolute Ins. Co., 346 So.2d 1227, 1228 (Fla. 3d DCA 1977). *See also* Oakland Prop. Corp. v. Hogan, 96 Fla. 40, 117 So. 846 (Fla. 1928) (holding that the owner of legal title to land is a necessary party to a foreclosure sale and that a foreclosure proceeding which results in such a sale without the owner being present in court does not transfer title).

b. Argument

25. Here, Defendant DARLENE DECINTI was never personally served with the lawsuit and therefore was never properly brought before this Court. *See* Affidavit of Darlene Decinti. As such, it was a mistake for this Court to enter a Final Judgment against the Defendants.

26. Specifically, while the Plaintiff alleges otherwise, the only summonses personally served were to Defendant MARCO V. DECINTI and the two JOHN DOE summonses discussed in Part I, *supra*. This Court must note that Mrs. Decinti has lived at the subject property during the entire life of this lawsuit and has never avoided service.

27. Moreover, Mrs. Decinti has not filed a responsive pleading in accordance with Fla. R. Civ. Pro. 1.100. The Plaintiff has explicitly agreed with this assessment as it filed, and obtained, a Clerk's Default against Mrs. Decinti on or about March 19, 2010. As such, the issue of service has not been waived by the Defendants.

28. Because Mrs. Decinti was never personally served, she was never properly brought before this Court. Therefore, it was a mistake for this Court to enter a Final Judgment against the Defendants.

WHEREFORE, based upon the foregoing, the Defendants respectfully request this Court quash service, vacate the Final Judgment entered against them, cancel the foreclosure sale, and any other relief the Court deems just and proper.

III. The Defendants' motions should be granted because it was a mistake for the Court to admit the purported original note where the Defendants questioned the note's authenticity and the note was not introduced at least twenty (20) days prior to the Summary Judgment hearing

a. Legal Standards

29. Fla. R. Civ. Pro. 1.510(c) provides, in pertinent part, that "[t]he movant [of a summary judgment motion] shall serve the motion at least 20 days before the time fixed for the hearing,

and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court." *Bold emphasis added*.

30. In Verizzo v. Bank of New York, 28 So.3d 976 (Fla. 2d DCA March 3, 2010), the Second District held that a mortgagee's filing of the original promissory note less than twenty (20) days before its hearing on summary judgment was a violation of Rule 1.510(c) and grounds for reversal of summary judgment.

31. There, the Second District reasoned that "cases have interpreted the rule to require that the movant also file the motion and documents with the court at least twenty days before the hearing on the motion." Id at 978.

b. Argument

32. Here, the facts of this case are directly on point with the Verizzo case, *supra*, and it was therefore a mistake for this Court to enter a Final Judgment against the Defendants.

33. Specifically, the Plaintiff here, just as the plaintiff in the Verizzo case, attempted to introduce a purported original note into evidence but did not file same at least twenty (20) days before the Summary Judgment hearing.

34. In fact, the Plaintiff here **did not introduce the purported original note until the day of the Summary Judgment hearing**.

35. This problem is compounded even further because at the Summary Judgment hearing the Defendants repeatedly questioned the authenticity of the purported note. Because the note was introduced the day of the Summary Judgment hearing, this was the first time the Defendants had the chance to examine the purported note. Therefore, at a minimum, the Defendants were estopped from a fair examination of all summary judgment evidence upon which the Plaintiff was relying.

WHEREFORE, based upon the foregoing, the Defendants respectfully request this Court quash service, vacate the Final Judgment entered against them, cancel the foreclosure sale, and any other relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this ___ day of October, 2010 to LAW OFFICES OF DAVID J. STERN, 900 South Pine Island Road, Suite 400, Plantation, FL 33324-3920.

By:_____
MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957

VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing and that the facts stated in it are true.

By:_____
DARLENE DECINTI

IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CIVIL DIVISION

NATIONAL CITY BANK SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE CO.,

CASE NO. 09-2466-CA

PLAINTIFF,

v.

MARCO V. DECINTI AND DARLENE DECINTI,

DEFENDANTS.
_____/

AFFIDAVIT OF DARLENE DECINTI

1. That I am at least twenty-one (21) years of age and am in all ways capable of making this Affidavit.
2. That I make this Affidavit based upon my own personal knowledge.
3. That I deny that I was ever personally served with the lawsuit as alleged by the Plaintiff.
4. That I deny that the purported original note offered by the Plaintiff is the promissory note which I signed.

FURTHER AFFIANT SAYETH NAUGHT.

_____
DARLENE DECINTI

State of Florida
County of _____

The foregoing instrument was acknowledged before me this _____ day of _____, 2010 by _____, who [ ] is personally known to me or [ ] has produced _____ as identification.

[Notary Seal]

_____
Notary Public
Printed Name:_____

MATTHEW D. WEIDNER, PA
1229 CENTRAL AVENUE ▪ ST. PETERSBURG FL 33705
727/894-3159

IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CIVIL DIVISION

NATIONAL CITY BANK SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE CO.,

CASE NO. 09-2466-CA

PLAINTIFF,

v.

MARCO V. DECINTI AND DARLENE DECINTI,

DEFENDANTS.
_____/

NOTICE OF FILING OF AFFIDAVIT OF DARLENE DECINTI

COMES NOW, the Defendants MARCO V. DECINTI and DARLENE DECINTI, by and through the undersigned counsel, and respectfully files this NOTICE OF FILING OF AFFIDAVIT OF DARLENE DECINTI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this ___ day of October, 2010 to LAW OFFICES OF DAVID J. STERN, 900 South Pine Island Road, Suite 400, Plantation, FL 33324-3920.

By:_____
MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957

IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA
CIVIL DIVISION

NATIONAL CITY BANK SUCCESSOR BY MERGER TO NATIONAL CITY MORTGAGE CO.,

CASE NO. 09-2466-CA

PLAINTIFF,

v.

MARCO V. DECINTI AND DARLENE DECINTI,

DEFENDANTS.
_____/

NOTICE OF APPEARANCE

COMES NOW the Defendants MARCO V. DECINTI and DARLENE DECINTI, by and through undersigned counsel, and hereby requests that their attorney of record be listed as

MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this ___ day of October, 2010 to LAW OFFICES OF DAVID J. STERN, 900 South Pine Island Road, Suite 400, Plantation, FL 33324-3920.

By:_____
MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957