

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

David Olivencia, Daliz Financial
Services, Inc., and LDL Accountant
and Associates CPAS, LLC,

CASE NO.: 2015-CA-9565-O
LOWER COURT CASE NO.:
2013-SC-4622-O

Petitioners,

v.

Adam Garcia,

Respondent.

Petition for Writ of Certiorari from an
Order Denying Motion to Quash Service of
Process and to Vacate Final Judgment,
County Court in and for Orange County, Florida,
Steve Jewett, County Court Judge.

Lisa Figueroa, Esq., for Petitioners.

Tushaar Desai, Esq., for Respondent.

Before DOHERTY, TURNER, and WOOTEN, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioners, David Olivencia, LDL Accountant and Associates CPAS, LLC, and Daliz Financial Services, Inc., challenge the trial court's order denying their Motion to Quash Service of Process as to All Defendants and to Vacate Final Judgment. This Court has jurisdiction. Fla. R. App. P. 9.030(c)(2). Because Respondent did not provide this Court with evidence that the Petitioners were served and Olivencia did not waive his right to contest service or personal jurisdiction by filing a claim of exemption to garnishment, we grant the petition.

On May 27, 2013, Respondent filed a three-count complaint against Petitioners. The process server executed Affidavits of Non-Service as to each Petitioner.

On September 3, 2013, Respondent's attorney filed a paper titled "Default," stating that a default is entered against the Petitioners for failing to attend a pre-trial conference. Respondent's attorney then filed several affidavits of diligent search and inquiry, stating the attempts he made to find out the Petitioners' name and current business addresses. None of these affidavits, however, state that Petitioners were served. There is also nothing before this Court showing that Respondent filed a return of service, an affidavit stating that Petitioners had been served, or a return receipt showing that Petitioners were served via certified mail.

The trial court entered a final judgment against the Petitioners on January 16, 2014. On October 20, 2014, Respondent filed a motion for writ of garnishment after judgment.

Olivencia, appearing pro se, filed a Claim of Exemption and Request for Hearing on November 7, 2014, in response to the garnishment proceedings. The Claim did not raise any issues regarding personal jurisdiction or service of process.

On May 29, 2015, Petitioners, through an attorney, filed their Motion to Quash Service of Process as to All Defendants and Motion to Vacate Final Judgment. During the hearing, Respondent's attorney stated, "[T]here was the service upon the Secretary of State; and the true, correct copy of everything was filed over to the defendant's address. I even have a signed copy that it was signed for as well, too, in regards to everything was served over to him at his place of employment." (Hr'g Tr. 8:3-9.) The following exchange then took place:

THE COURT: . . . you said that you have Secretary of State and all that stuff, because that's not [in] the file; and I assume that you don't have that as well.

MS. MITCHELL [Petitioners' counsel]: I don't, and I've actually requested that from counsel via e-mail, if he had any proof of proper service—

THE COURT: Right.

MS. MITCHELL: -- to let me know, months ago when the original motion to quash was filed.

THE COURT: Right.

Show her first.

MR. DESAI [Respondent's counsel]: Yes. Actually have everything signed by L.D.L. This is the second one with the return receipt signed.

That's to the Secretary of State, and the other one is actually given to L.D.L.

(*Id.* 10:7-23.) Whatever Respondent's attorney showed the trial court and opposing counsel during the hearing, it was not filed in this certiorari case.

The trial court denied the motion to quash service and vacate the judgment, and Petitioners timely sought review in this Court.

A. Standard of Review

In a certiorari proceeding, the circuit court is limited to determining whether the lower tribunal's decision was supported by competent substantial evidence, whether there was a departure from the essential requirements of the law, and whether procedural due process was accorded. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).

B. Service of Process

Petitioners argue that service of process was defective and the Court did not obtain personal jurisdiction over them. Petitioners assert that no proof of service via certified mail or affidavit was filed and that Affidavits of Diligent Search and Inquiry are not affidavits of service.

There is nothing in the Appendices before this Court that shows Petitioners were served with process. The process server filed Affidavits of Non-Service as to each Petitioner and Respondent's attorney filed several affidavits of diligent search and inquiry. None of these affidavits state that Petitioners were served.

In response to Petitioners' argument that there is no evidence that they were served, Respondent did not file a return of service. Respondent also did not submit an affidavit stating that Petitioners were served, nor did he file a return receipt evidencing that Petitioners were served via certified mail. Although it appears from the hearing transcript that Respondent's attorney showed the trial court and opposing counsel something indicating service upon the Secretary of State, no such document was filed in this certiorari proceeding, even though Respondent did file his own appendix to his Response to the Petition for Writ of Certiorari.

"[W]ithout proper service of process, the court lacks personal jurisdiction over the defendant." *M.J.W. v. Dep't of Children & Families*, 825 So. 2d 1038, 1041 (Fla. 1st DCA 2002). The court relies on the return of service to determine whether it has personal jurisdiction. *Koster v. Sullivan*, 160 So. 3d 385, 388 (Fla. 2015). "The court cannot proceed in a matter until proper proof of valid service is made." *Re-employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 471 (Fla. 5th DCA 2007). "The party who seeks to invoke the court's jurisdiction bears the burden of proving proper service." *Koster v. Sullivan*, 160 So. 3d at 389.

A clerk does not have authority to enter a default if there is a mistake or omission in the return of service, because there is no personal jurisdiction. *See Chigurupati v. Progressive Am. Ins. Co.*, 132 So. 3d 263, 266 (Fla. 4th DCA 2013) (clerk was without authority to enter default when return of service was not sworn to or notarized as Florida Statute section 48.194 requires). In addition, "[a] total lack of service of process renders a judgment void, not voidable." *Kathleen*

G. Kozinski, P.A. v. Phillips, 126 So. 3d 1264, 1268 (Fla. 4th DCA 2013); *see also Jennings v. Montenegro*, 792 So. 2d 1258, 1261 (Fla. 4th DCA 2001) (service of process should have been quashed when plaintiffs failed to serve the Secretary of State with amended complaint, as there is no jurisdiction without strict compliance with the substituted service statutes).

Respondent has not provided this Court with any documents showing that there was evidence before the trial court that Petitioners were served. Therefore, there is nothing before the Court demonstrating competent substantial evidence supporting the trial court's finding that the Respondent established service on Petitioners. Without service, the trial court lacked jurisdiction over the Petitioners, and the judgment entered against them is void.

Instead of submitting documents evidencing service of process, Respondent argues that the petition should be dismissed because the Petitioners did not file it within the twenty days ordered by this Court to do so. Respondent relies on the law regarding dismissal for lack of jurisdiction when a notice of appeal or petition for writ of certiorari is untimely filed. This argument is inapplicable, however, as Petitioners timely sought review in this Court of the trial court's order.

C. Waiver of personal jurisdiction or service of process

Although the trial court found that Respondent did not establish personal service on Olivencia, it concluded that Olivencia waived his right to contest personal jurisdiction or service of process by filing a claim of exemption to the garnishment without asserting those issues. This is the only other argument Respondent makes in contesting the Petition for Writ of Certiorari.

A defendant can waive his right to contest personal jurisdiction by seeking affirmative relief from the court. *Mason v. Hunton*, 816 So. 2d 234, 234 (Fla. 5th DCA 2002). Filing

defensive motions or compulsory counterclaims, however, will not waive the right to contest personal jurisdiction. *Id.*; *Arch Aluminum & Glass Co. v. Haney*, 964 So. 2d 228, 235 (Fla. 4th DCA 2007) (asserting compulsory counterclaim does not waive the right to contest personal jurisdiction because “a compulsory counterclaim is waived if not asserted in the answer.”).

Under Florida Statute section 77.041, Olivencia had only twenty days from the date of receiving the notice of garnishment to file the form claiming an exemption from garnishment. *Zivitz v. Zivitz*, 16 So. 3d 841, 847 (Fla. 2d DCA 2009) (because form for claim of exemption from garnishment set forth in section 77.041 uses “must” to state when form must be filed to establish exemption, debtor is required to timely assert the exemption to protect the money). If he failed to timely file the exemption, under *Zivitz*, Olivencia would lose that protection.

In *Parker v. George S. Heilpern, Trust*, 637 So. 2d 295, 296 (Fla. 4th DCA 1994), the defendant’s motions to quash service were granted, but while a motion for rehearing on that order was pending, a co-defendant in the mortgage foreclosure action “filed a motion to be allowed to share in the proceeds of any sale.” The defendant then filed an objection to the co-defendant’s motion. *Id.* The Fourth District held that the defendant’s objection to the motion was not a request for affirmative relief that waived her right to contest personal jurisdiction. *Id.* The defendant should not “be forced to risk having waived any objection to the codefendant’s motion” if the trial court granted the motion for rehearing on her motion to quash service of process. *Id.*

In this case, if Olivencia did not file a claim of exemption within twenty days from receiving the notice of garnishment, under *Zivitz* he would have lost that protection. Olivencia’s claim of exemption is analogous to the objection filed in *Parker*, as both defendants were objecting to a disbursement of money, and both objections could have been lost if not asserted.

Therefore, under *Parker*, Olivencia's claim of exemption was not a waiver. The trial court departed from the essential requirements of the law in finding that Olivencia waived his right to contest personal jurisdiction and service of process by filing a claim of exemption.

D. Requests for appellate attorney's fees

Petitioners and Respondent both ask the Court to award them appellate attorney's fees, but neither one cites any authority supporting an award of fees. Therefore, both requests are denied. *See* Fla. R. App. P. 9.400(b) (request for appellate attorney's fees must be made in a motion stating "grounds on which recovery is sought . . ."); *Garcia v. Collazo*, 178 So. 3d 429, 430 (Fla. 3d DCA 2015) (Rule 9.400 is procedural and does not provide substantive basis for appellate attorney's fees; party seeking appellate attorney's fees must file separate motion setting forth "particular contractual, statutory, or other substantive basis for an award of fees on appeal.").

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Certiorari is **GRANTED**, the Order on Defendants['] Motion to Quash Service of Process as to All Defendants and To Vacate Final Judgment is **QUASHED**, and this matter is remanded to the County Court for further proceedings.
2. Petitioners' and Respondent's requests for appellate attorney's fees are **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 16th day of March, 2016.

/S/
PATRICIA A. DOHERTY
Presiding Circuit Judge

TURNER and WOOTEN, J.J., concur.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Steve Jewett, County Court Judge**, 425 N. Orange Avenue, Orlando, Florida 32801, **Lisa Figueroa, Esq.**, The Figueroa Law Firm, 5626 Curry Ford Rd., Suite 140, Orlando, FL 32822; and **Tushaar Desai, Esq.**, Desai & Maya, P.A., 1540 Lake Baldwin Lane, Suite B, Orlando, FL 32814, on this 16th day of March, 2016.

/S/ _____
Judicial Assistant