IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE PANAMA CITY GENERAL PARTNERSHIP,

Appellant,

v.

GODFREY PANAMA CITY INVESTMENT, LLC (a Maryland Limited Liability Company),

Appellee.
_____/

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

CASE NO. 1D12-3141

Opinion filed March 6, 2013.

An appeal from the Circuit Court for Washington County.
Christopher N. Patterson, Judge.

Sally B. Fox and Brian J. Hooper of Emmanuel, Sheppard & Condon, Pensacola, for Appellant.

Dixon Ross McCloy, Jr., and Heather K. Hudson of Harrison Sale McCloy, Panama City, for Appellee.

THOMAS, J.

Appellant, The Panama City General Partnership ("Partnership"), appeals the trial court's non-final order denying the Partnership's motion to quash service and set aside a default entered in Appellee's ("Godfrey") favor and the denial of its motion for rehearing or reconsideration.

We hold the motion for rehearing or reconsideration is properly considered as a motion for reconsideration, because a motion for rehearing is not authorized on a nonfinal order. And although a motion for reconsideration of a nonfinal order does not toll the 30-day time limit for appeal, the order denying the Partnership's motion for reconsideration was entered and appealed within 30 days from the entry of the original nonfinal order. See Fla. R. App. P. 9.020(i); Fla. R. App, P. 9.130(b); see also Agere Sys., Inc. v. All American Crating, Inc., 931 So. 2d 244 (Fla. 5th DCA 2006). As such, under these unique circumstances, the original nonfinal order and the order denying reconsideration are both properly before this court, as both were filed within 30 days of the trial court's original nonfinal order. Otherwise, the order denying the Partnership's motion for reconsideration of an appealable nonfinal order is not in itself, alone, an appealable order. Agere, 931 So. 2d at 245.

Furthermore, while "a legally insufficient motion to vacate a default cannot be corrected as a matter of *right* by a motion for reconsideration or hearing, a trial court does have the inherent *discretionary* power to reconsider any order entered prior to the rendition of final judgment in the cause." City of Hollywood v. Cordasco, 575 So. 2d 301, 302 (Fla. 4th DCA 1991) (emphasis in original); Monte Campbell Crane Co., Inc., 510 So. 2d 1104 (Fla. 4th DCA 1987) (holding that unauthorized motion for rehearing to set aside default heard by trial court will be

considered as motion for reconsideration); see generally, James H. Wyman, *Reconsideration or Rehearing: Is There a Difference*, Fla. B.J., 83, June 2009, at 79. Because the trial court exercised its discretionary power and reached the merits of Appellant's motion, we do so as well.

Godfrey filed a complaint against the Partnership for breach of contract. An affidavit of service was filed with the court by Robert Brady, process server, asserting that he had served a summons and complaint on George Porretta, the managing partner of the Partnership, at his home in Huntley, Illinois, on December 21, 2011. An entry of default was entered against the Partnership. Approximately three months later the Partnership filed a motion to quash service and set aside default, asserting that Porretta had moved from his home to an assisted living facility in Lincolnshire, Illinois, two days before the date of the alleged service.

One day before the hearing on the motion to quash service and set aside default, Godfrey filed Brady's supplemental affidavit stating that he had served Porretta on November 25, 2011 (when the complaint was mistakenly filed in Bay County), and again on December 21, 2011 (with the summons and complaint for this case).

At the hearing, the Partnership asserted that Porretta's affidavit denying service was sufficient to quash service, but if the trial court disagreed, then Porretta's and Brady's conflicting affidavits required the trial court to conduct a

separate evidentiary hearing. The trial court stated that the Partnership could present evidence and testimony to support Porretta's affidavit, but declined to continue the hearing in order to give the Partnership time to prepare supporting evidence. The Partnership, however, was not prepared to present evidence or testimony to support Porretta's denial of service.

The trial court denied the motion to quash service and set aside default, finding that Porretta's mere denial of service was insufficient to impeach the validity of the summons and that the Partnership failed to demonstrate excusable neglect. Thereafter, the Partnership filed a motion for rehearing or reconsideration, asserting new arguments to quash service and providing additional exhibits to support Porretta's denial of service. The trial court denied the motion on the merits, finding the motion raised no new arguments.

We do not find that the trial court abused its discretion in declining to continue the hearing in order to allow the Partnership to present additional evidence. "[A] process server's return of service on a defendant which is regular on its face is presumed to be valid absent clear and convincing evidence presented to the contrary." Telf Corp. v. Gomez, 671 So. 2d 818, 818 (Fla. 3d DCA 1996). "[A] defendant may not impeach the validity of the summons with a simple denial of service, but must present 'clear and convincing evidence' to corroborate his denial." Id. at 819 (quoting Fla. Nat'l Bank v. Halphen, 641 So. 2d 495, 496 (Fla.

3d DCA 1994)). Here, the Partnership called up its own motion to quash service and was aware that an affidavit of service had been filed, yet came to the hearing only prepared to deny the service to Porretta. This was insufficient as a matter of law, thus, the trial court did not abuse its discretion in declining to continue the hearing to give the Partnership additional time to prepare.

We reverse, however, for an evidentiary hearing based upon the Partnership's motion for reconsideration, which makes a prima facie case to challenge service. See Thompson v. State, Dep't of Revenue, 867 So. 2d 603, 605 (Fla. 1st DCA 2004). The Partnership's motion attached Porretta's amended affidavit, an affidavit from Porretta's son, a receipt from the moving company, and a letter from the director of the retirement community where Porretta now resides. All of these exhibits supported the Partnership's assertion that Porretta had moved from his home two days before the date of the alleged service.

Further, the motion did more than deny service -- it challenged the affidavit of service as facially defective. In Florida "there is a strong preference for lawsuits to be determined on the merits rather than by default judgment." Southeast Land Developers, Inc. v. All Florida Site and Utilities, Inc., 28 So. 3d 166, 167 (Fla. 1st DCA 2010) (citing Tutwiler Cadillac, Inc. v. Brockett, 551 So. 2d 1270, 1272 (Fla. 1st DCA 1989), and Geer v. Jacobsen, 880 So. 2d 717, 720 (Fla. 2d DCA 2004)). Therefore, because the trial court, in its discretionary power, considered the

Partnership's motion for reconsideration, and the motion raised more than a mere denial of service, an evidentiary hearing is required.

REVERSED and REMANDED.

WOLF, J., CONCURS; CLARK, J., DISSENTS WITH OPINION.

CLARK, J., DISSENTS.

I dissent. The amended notice of appeal designates the order denying the motion to quash service and set aside default as the order on appeal. See Fla. R. App. P. 9.130(c). This is an appealable order because the trial court found, after the evidentiary hearing on the motion, that the licensed process server "personally served the summons and complaint upon Defendant on December 21, 2011." Thus, the trial court's order made a fact determination that valid service of process had occurred, conferring personal jurisdiction over the defendant upon the court. Interlocutory orders that determine issues involving service of process are appealable under rule 9.130(a)(3)(C)(i), Florida Rules of Appellate Procedure. Fisher v. Int'l Longshoremen's Ass'n, 827 So. 2d 1096 (Fla. 1st DCA 2002).

On the other hand, the order denying the defendant's motion for rehearing or reconsideration is not an appealable order. While a trial court has the authority upon a motion for rehearing to "reopen the judgment if one has been entered, take additional testimony and enter a new judgment," pursuant to rule 1.530(a), Florida Rules of Civil Procedure, the trial court's authority does not add to the appellate jurisdiction in this court. Non-final orders are only appealable if they are included in one of the categories listed in rule 9.130. Nat'l Lake Devs., Inc. v. Lake Tippecanoe Owners Ass'n, Inc., 417 So. 2d 655 (Fla. 1982). As stated in Agenre Systems Inc. v. All American Crating, Inc., 931 So. 2d 244, 245 (Fla. 5th DCA

2006), "an order that simply denies a motion for reconsideration or rehearing of an underlying non-final order . . . is not in itself an appealable order."

Likewise, an order denying a motion to set aside a clerk's default is not an appealable non-final order under rule 9.130(a)(3), Florida Rules of Appellate Procedure. BMW Fin. Servs. NA v. Alger, 834 So. 2d 408 (Fla. 5th DCA 2003); Bedi v. BAC Home Loans Serv., LP, 64 So. 3d 681 (Fla. 2d DCA 2011). The fact that the denial of the motion to set aside clerk's default was contained in the same order as the denial of the motion to quash service does not allow appellate review by this court. Other rulings contained in the same order as the ruling on service of process do not "tag along" to become appealable non-final orders under rule 9.130(a)(3)(C)(i). RD & G Leasing, Inc. v. Stebnicki, 626 So. 2d 1002 (Fla. 3d DCA 1993); Swartz v. CitiMortgage, Inc., 97 So. 3d 267, n. 1 (Fla. 5th DCA 2012). The order denying the motion to set aside the clerk's default does not become an appealable non-final order by virtue of being contained in the order denying motion to quash service.

Accordingly, our review in this appeal is limited to the portion of the trial court's order entered June 7, 2012, denying the motion to quash service of process upon the defendant.

The complaint for breach of contract was filed on November 29, 2011, in the Fourteenth Judicial Circuit in Washington County, Florida. Godfrey Panama City

Inv. LLC v. The Panama City Gen. P'ship, Case No. 2011-CA-0503. Summons was issued by the Clerk of Court with correct case number, case style, and Court designation. The defendant's address was located in the State of Illinois. On January 4, 2012, the affidavit of service signed and sworn to by the Illinois process server, Robert Brady, was filed with the court. The affidavit stated that service was obtained upon the defendant's representative, George Porretta, at the Illinois address, on December 21, 2011. Plaintiff filed its motion for default for the defendant's failure to file any paper in the action on January 12, 2012, and the clerk entered a default that same date. Fla. R. Civ. P. 1.500(a).

On March 2, 2012, fifty days after entry of the clerk's default, Defendant Panama City General Partnership filed its motion to quash service and set aside default. The Partnership contested the fact of service of process, claiming that Mr. Porretta was never served with the Complaint and Summons for Washington County case number 2011 CA 0503 and that he had changed his residence two days prior to the purported service of process on December 21, 2011. A supporting affidavit of George Porretta was attached to the motion. The hearing on defendant's motion was set for June 5, 2012.

On the day before the hearing, June 4, 2012, Plaintiff filed a second affidavit of Illinois process server Robert Brady. Mr. Brady's affidavit contested the facts asserted in Mr. Porretta's affidavit and attested to additional details of the service

of process upon Mr. Porretta on December 21, 2011. The hearing on Defendant's motion proceeded on June 5, 2012, as scheduled. Both parties were represented by counsel and there was no question that each party had sufficient notice of the hearing. The evidence presented by Defendant was Mr. Porretta's affidavit, filed with the defense's motion. The plaintiff's evidence consisted of the two affidavits of process server Brady, the first filed January 4, 2012 and the second filed June 4, 2012.

As the hearing progressed, defense counsel argued that Mr. Porretta's affidavit denying service of process was sufficient to quash service of process, but if the judge was inclined to deny the motion, "we are, under the law, completely entitled to an evidentiary hearing." Plaintiff's counsel argued that the hearing on the motion to quash service constituted an evidentiary hearing and that evidence had been submitted in the form of affidavits. Both parties had notice of the hearing and were free to prepare and present whatever evidence they deemed appropriate. The court noted that the motion was filed by the defense, that both parties had notice of the hearing upon the defense motion, and declined to set an additional hearing. The court issued its order a few days later, on June 7, 2012.

In the order denying motion to quash service and set aside default, the trial court found that the "record demonstrates that Robert A. Brady, a licensed process server in the State of Illinois, personally served the summons and complaint upon

Defendant December 21, 2011." Thus, the trial court determined the weight and credibility to be given the conflicting affidavits filed in the case and made a finding of fact based on that evidence. The court then applied the law, as set out in SunTrust Bank v. Electronic Wireless Corp., 23 So. 3d 774 (Fla. 3d DCA 2009) and Telf Corp. v. Gomez, 671 So. 2d 818 (Fla. 3d DCA 1996), that "the Defendant may not impeach the validity of the summons simply by a denial of service." Concluding that "the Defendant has failed to sustain the high burden of demonstrating the invalidity of service," the court denied the motion to quash service. In addition, the court denied the motion to set aside the clerk's default which, as previously noted, is not on review.

Defendant, The Panama City General Partnership, filed its motion for rehearing or reconsideration on June 18, 2011. The Partnership asserted extensive facts in its motion and attached exhibits to support its allegations that Mr. Porretta was not located at the residential address on December 21, 2011, and that Mr. Brady's affidavits were far outweighed by the counter-affidavits and other evidence the Partnership was now prepared to present to the court. However, without conducting a hearing on the motion, the trial court entered its order denying rehearing or reconsideration on June 19, 2011. The trial court did not make any findings of fact or otherwise indicate that it accepted additional evidence or alter its original order on the motion in any way. As previously explained,

although the trial court certainly could have reopened the matter, held an additional hearing, and entered a new order on the motion to quash service and set aside default, the trial court's decision not to do so is not an appealable order reviewable by this court.

The trial court properly concluded that the hearing on Defendant's motion was the evidentiary hearing to which Defendant was entitled. The conflicting affidavits filed in this case and considered at the hearing on the motion in this case are competent substantive evidence, unlike the mere argument of counsel presented in Linville v. Home Sav. of America, 629 So. 2d 295 (Fla. 4th DCA 1993) and single affidavit and argument of counsel presented in Fern, Ltd. v. Road Legends, Inc., 698 So. 2d 364 (Fla. 4th DCA 1997).

I would affirm the order denying the motion to quash service of process and set aside default.