

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D22-0054

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TUSCAN RIVER ESTATE, LLC,

Appellant,

v.

U.S. BANK TRUST NATIONAL  
ASSOCIATION, not in its  
individual capacity but solely as  
Trustee of Greene Street  
Funding Trust,

Appellee.

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On appeal from the Circuit Court for Duval County.  
A. C. Soud, Jr., Judge.

November 30, 2022

WINOKUR, J.

This case concerns service of process on an unregistered foreign limited liability company (“LLC”) who is not doing business in the State of Florida. U.S. Bank Trust National Association (“U.S. Bank”) filed a mortgage foreclosure action against Tuscan River Estate, LLC (“Tuscan River”). Tuscan River claimed that it was not properly served but the trial court denied its motion to

quash service of process. Tuscan River appeals.<sup>1</sup> Because we agree that the attempted service did not comply with the applicable statutes, we reverse.

Tuscan River is a Delaware LLC. In 2019, Tuscan River executed and delivered a promissory note and mortgage on real property in Jacksonville. When Tuscan River failed to make the mortgage payment that was due on April 1, 2019, resulting in a default, U.S. Bank sought to foreclose.

U.S. Bank first attempted to serve Tuscan River at the address listed as Tuscan River's address on the "Corporate Warranty Deed" to no avail. U.S. Bank then successfully effectuated service of process on an individual that it believed to be Tuscan River's registered agent, which resulted in Tuscan River's first motion to quash service of process, arguing that service was improper because the person served was no longer associated with the LLC. The trial court denied the motion.

Tuscan River later filed a motion for summary judgment in which it again argued that service of process was improper. In support of its motion, Tuscan River filed an affidavit that named Albert Losken as its sole managing member. Based on these new facts, U.S. Bank sought leave to amend its complaint to allege the necessary jurisdictional allegations to support service. The court ordered the Clerk of Court to issue an alias summons to effectuate service of process on Tuscan River through the Florida Secretary of State ("Secretary"). U.S. Bank filed a copy of the correspondence from the Florida Department of State, confirming service on Tuscan River through the Secretary.

Tuscan River then filed its second motion to quash service of process. This time, Tuscan River argued that the service was not effectuated in compliance with section 48.062, Florida Statutes (2021), because U.S. Bank did not attempt to serve a managing

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<sup>1</sup> This Court has jurisdiction to review this non-final order because an order denying a motion to quash service of process establishes personal jurisdiction in the trial court. *See Green v. Jorgensen*, 56 So. 3d 794, 796 (Fla. 1st DCA 2011).

member of Tuscan River before serving the Secretary.<sup>2</sup> In response, U.S. Bank argued that it did not need to exercise “reasonable diligence” before effectuating service through the Secretary under the reasoning of *Magnolia Court, LLC v. Moon, LLC*, 299 So. 3d 423 (Fla. 3d DCA 2019). Though Tuscan River submitted that there was no evidence that it was transacting business in Florida, the trial court denied its motion.

This Court reviews a trial court’s non-final order denying a motion to quash service of process de novo. *Green*, 56 So. 3d at 796. Because valid service of process is necessary to vest jurisdiction in the trial court, the court lacks personal jurisdiction over Tuscan River until service is perfected. *See Swarek v. Lindsay*, 316 So. 3d 815, 815 (Fla. 1st DCA 2021); *Modway, Inc. v. OJ Commerce, LLC*, 331 So. 3d 723, 726 (Fla. 4th DCA 2021).

As a foreign LLC, Tuscan River may not transact business in this state until it obtains a certificate of authority from the Department of State. § 605.0902(1), Fla. Stat. A foreign LLC that has such a certificate is a “registered” foreign LLC. § 605.0102(61), Fla. Stat. Because it has no such certificate, Tuscan River is an unregistered foreign LLC.

The core disagreement between the parties on appeal is which Florida statute governs service of process on Tuscan River as an unregistered foreign LLC. Claiming that there is no evidence that it is transacting business in the state, Tuscan River argues that section 48.062 should apply. U.S. Bank counters that sections 48.181 and 605.0904, Florida Statutes (2021), govern service of process because Tuscan River is a foreign LLC who has neither registered with the Florida Department of State nor maintains a certificate of authority to transact business in the state.

If Tuscan River were transacting business without a certificate of authority, then section 605.0904 would clearly apply. This section provides that an unregistered foreign LLC who

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<sup>2</sup> Sections 48.062 and 48.181 were amended in 2022. Ch. 2022-190, §§ 3, 12, Laws of Fla. All statutory citations in this opinion refer to the 2021 version of the statute.

transacts business in the state without first obtaining a certificate of authority appoints the Secretary as its agent for service of process. *See* § 605.0905(6), Fla. Stat.; *see also Magnolia Ct., LLC*, 299 So. 3d at 426 (explaining that section 605.0904(6) makes the Secretary the “statutory equivalent of the ‘designated agent’ of the LLC for service of process purposes”).

However, U.S. Bank’s reliance on *Magnolia Court* is misplaced because there was no evidence that Tuscan River was transacting business in the state. *See Magnolia Ct., LLC*, 299 So. 3d at 426–27 (holding that compliance with section 605.0904(6) resulted in perfected service of process on an unregistered, foreign LLC who failed to maintain a certification of authority to transact business in the state and who was sued as a result of that business). Section 605.0905, Florida Statutes, enumerates activities which do not constitute “transacting business” as the phrase is used throughout chapter 605. Among those activities are “[c]reating or acquiring indebtedness, mortgages, and security interests in real and personal property” and “[o]wning, without more, real or personal property.” § 605.0905(1)(g), (m), Fla. Stat. Additionally, there is no evidence in the record that the property in question was “income-producing.” § 605.0905(3), Fla. Stat. Accordingly, there is insufficient record evidence to support U.S. Bank’s argument that Tuscan River transacted business and, thus, appointed the Secretary as its agent.

Section 48.181 is equally inapplicable for the same reason. This section provides that nonresidents, whether they be individuals or “any other form or type of association,” who engage in business in Florida, designate the Secretary as their agent for service of process with regards to any proceeding arising out of their business in the state. § 48.181(1), Fla. Stat. Merely owning or acquiring real property is insufficient to prove that Tuscan River was engaging in business under section 48.181. *See Odell v. Signer*, 169 So. 2d 851, 853 (Fla. 3d DCA 1964) (holding that the “signing of a note and the defense of a law suit are not sufficient acts, in and of themselves, to constitute carrying or engaging in business or business ventures”); *Hayes v. Greenwald*, 149 So. 2d 586, 587 (Fla. 3d DCA 1963) (holding that the isolated sale of real property does not amount to a “business venture” unless the real property is sold as business property in connection with a planned

business operation); *Lyster v. Round*, 276 So. 2d 186, 188–89 (Fla. 1st DCA 1973) (applying the holding in *Hayes* to the purchase of real property). Accordingly, section 48.181 does not apply.

Because there was no evidence that Tuscan River was “transact[ing] business,” § 605.0904, Fla. Stat., or “operat[ing], conduct[ing], engag[ing] in, or carry[ing] on business or business venture,” § 48.181, Fla. Stat., in the state, section 48.062 applies. This section governs service of process on an LLC, whether “domestic or foreign,” regardless of whether it is doing business in Florida. § 48.062(1), Fla. Stat. If service of process cannot be effectuated on an LLC’s registered agent because the LLC failed to comply with chapter 605, the LLC does not have a registered agent, or the registered agent cannot be served after the exercise of reasonable diligence, then a manager of a manager-managed LLC or a member of a member-managed LLC may be served. *See* § 48.062(2), Fla. Stat. “If, after reasonable diligence, service of process cannot be completed under subsection (1) or subsection (2), service of process may be effected by service upon the Secretary . . . .” § 48.062(3), Fla. Stat.

Service of process on the Secretary under section 48.062(3) is referred to as “substituted” service of process. *See, e.g., Green Emerald Homes, LLC v. PNC Bank, N.A.*, 207 So. 3d 1027, 1028 (Fla. 5th DCA 2017). Substituted service is authorized under this subsection “if the plaintiff has already made reasonably diligent efforts to serve the LLC under section 48.062(1) and (2).” *Green Emerald Homes LLC v. Green Tree Servicing LLC*, 230 So. 3d 607, 608 (Fla. 4th DCA 2017). “Perfection of substituted service requires strict compliance with the statutory prerequisites because such service is an exception to personal service.” *PNC Bank, N.A.*, 207 So. 3d at 1028 (quoting *Wyatt v. Haese*, 649 So. 2d 905, 907 (Fla. 4th DCA 1995)).

Section 48.062(1) requires an attempt at service of process on an LLC’s registered agent. However, this subsection presupposes that the LLC to be served has registered with the Florida Department of State. *See* § 48.062(1), Fla. Stat. (directing service of process on “the registered agent designated by the limited liability company under chapter 605”). Because Tuscan River is

unregistered, there was no registered agent for U.S. Bank to attempt to serve.

Moving on to subsection (2), U.S. Bank could have effectuated service of process on a member of Tuscan River. *See* § 48.062(2), Fla. Stat. While the statute does not delineate how many attempts to effectuate service of process must be made before moving on to substituted service, this inquiry leads to the “reasonable diligence” determination, to which we turn next.

To determine whether a plaintiff has exercised “reasonable diligence,” courts have considered whether the plaintiff has employed the knowledge at its command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances to acquire the information necessary to effectuate service of process. *See Twin Oaks Villas, Ltd. v. Joel D. Smith, L.L.C.*, 79 So. 3d 67, 68 (Fla. 1st DCA 2011). “[P]roof of a few attempts at service of process are insufficient to prove diligent search.” *Parker v. LaSalle Bank Nat’l Ass’n*, 82 So. 3d 976, 978 (Fla. 4th DCA 2011) (alteration in original) (quoting *Demars v. Village of Sandalwood Lakes Homeowners Ass’n*, 625 So. 2d 1219, 1221 (Fla. 4th DCA 1993)). Courts have also held that reasonable diligence was not exercised where the plaintiff failed to follow an “obvious” lead. *Dubois v. Butler ex re. Butler*, 901 So. 2d 1029, 1030 (Fla. 4th DCA 2005); *see, e.g., Howard v. Gualt*, 259 So. 3d 119, 122 (Fla. 4th DCA 2018) (reversing the default judgment because the record reflected “only three attempts at service at addresses located through Sunbiz.org” and was “silent as to any follow-up investigation”).

Here, U.S. Bank first attempted to effectuate service of process on the address that was listed as Tuscan River’s post office address in the deed. It then attempted to serve an individual who it believed to be authorized to accept service on behalf of Tuscan River. After finding out that the person who was served was no longer associated with Tuscan River, U.S. Bank quashed its own service of process and amended its complaint to allege the requisite jurisdictional grounds for substituted service. All the while, Tuscan River had informed U.S. Bank of its managing member, Losken, and U.S. Bank failed to follow this “obvious” lead. *Dubois*, 901 So. 2d at 1030. An address that seems to be associated with

Losken appears under his signature on the mortgage document that was attached to the complaint. Yet, U.S. Bank made no attempt to effectuate service of process on him.<sup>3</sup> As a result, U.S. Bank's attempts at service of process do not amount to the reasonable diligence necessary to support allowing substituted service where U.S. Bank could have attempted service on a known managing member.

For these reasons, the non-final order on appeal is REVERSED.

BILBREY and LONG, JJ., concur.

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

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Kenneth A. Tomchin and Taylor R. Schmidinger of Taylor, Day, Grimm & Boyd, Jacksonville, for Appellant.

Adam A. Diaz and Kathleen Achille of Diaz, Anselmo & Associates, P.A., Plantation, for Appellee.

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<sup>3</sup> That Losken's purported address is an out-of-state address makes no difference because "service of process on persons outside of this state shall be made in the same manner as service within the state." § 48.194(1), Fla. Stat.