

Third District Court of Appeal

State of Florida

Opinion filed November 27, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-722
Lower Tribunal No. 15-25517

Magnolia Court, LLC and Buena Vista Design Plaza, LLC,
Appellants,

vs.

Moon, LLC,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Peter R. Lopez, Judge.

Kaplan, Young & Moll-Parrón and Matthew S. Sarelson; Samson Appellate Law and Daniel M. Samson, for appellants.

Schlesinger Law Group, Michael J. Schlesinger and Aaron S. Finesilver, for appellee.

Before EMAS, C.J., and FERNANDEZ, and LOGUE, JJ.

FERNANDEZ, J.

Magnolia Court, LLC and Buena Vista Design Plaza, LLC appeal the trial court's order granting the defendant, Moon, LLC's, motion to vacate default and default final judgment. We reverse, finding that service was properly effectuated on Moon, LLC, and thus, appellants were not required to comply with the substituted service provisions of Chapter 48, Florida Statutes (2018).

On November 2, 2015, appellants Magnolia Court, LLC & Buena Vista Design Plaza, LLC filed a single count complaint seeking a declaratory judgment on an alleged contract regarding two parcels of commercial real estate in Miami. On December 8, 2015, appellants attempted to serve Moon, LLC, by serving Daniel S. Moon, the company's owner and possible registered agent, at a City of Miami address but were unable to do so as a result of his absence. After verifying in the Sunbiz website that there is no Florida, LLC or Foreign, LLC by the name of "Moon, LLC," the process server put together a verified return of non-service.

As a result of there being no authorized person to accept service, appellants filed an amended complaint and served process on the Florida Department of State, which accepted service pursuant to section 605.0904(6), Florida Statutes (2018). However, the Secretary of State did not forward the notice to Moon, LLC. Consequently, appellants filed a motion for default judgment on January 5, 2016, which the trial court later granted on January 21, 2016 after a final hearing. On February 1, 2016, the trial court entered a default final judgment against Moon, LLC.

Nineteen and a half months after the default judgment was entered, appellee moved to vacate the default final judgment, contending that the judgment was void for failure to provide actual service to Moon, LLC. Moon, LLC further alleged that based on Florida Rule of Civil Procedure 1.540(b), default should be vacated due to excusable neglect, meritorious defense, and due diligence.

Appellants responded that Moon, LLC's motion was untimely, as it was filed more than one year after default final judgment. Moon, LLC then filed an amended verified motion to vacate default and default final judgment where it argued that appellants were required to effectuate substitute service upon Moon, LLC and comply with section 48.161, Florida Statutes (2018), and that their failure to do so rendered the default judgment void as a matter of law.

Appellants responded by contending that Florida's Revised LLC Act supersedes the substitute service statute for foreign limited liability companies who fail to register to do business in Florida. In addition, appellants also contended that the amended motion to vacate was untimely, as it asserts a procedural defect with service of process and is thus subject to the one-year limitation set forth in rule 1.540(b). Lastly, appellants also argued that Moon, LLC's counsel had actual notice of the default final judgment within the one-year time period, which would have allowed Moon, LLC to file its rule 1.540(b) motion within the one-year time-frame.

After the hearing on the motion, the trial court determined that while section 605.904(6) appoints the Secretary of State as the designated registered agent for an unregistered foreign LLC, appellants were still required to comply with the substitute service provisions of Chapter 48. Thus, the trial court granted Moon, LLC's motion and vacated the default final judgment as having been void for failure to comply with the substitute service provisions of chapter 48. Appellants now appeal this order and contend that the trial court erred by ruling that section 605.0904(6) is a substitute service provision, rather than an original service provision. We agree.

As an unregistered, foreign limited liability company doing business in Florida, Moon, LLC is subject to section 605.0904(6) of Florida's Revised LLC Act. This section states, "If a foreign limited liability company transacts business in this state without a certificate of authority or cancels its certificate of authority, it appoints the department as its agent for service of process for rights of action arising out of the transaction of business in this state." Thus, the issue of first impression before this Court is whether service pursuant to section 605.0904(6) on an unregistered foreign limited liability company doing business in Florida is "personal service" so that appellants in this case did not have to comply with the substituted service provisions of Chapter 48. We agree with appellants that the answer to this question is yes.

Service properly effectuated on a corporation or limited partnership by serving the designated agent is characterized as personal service and not substituted service. See Country Clubs of Sarasota, Ltd. v. Zaun Equipment, Inc., 350 So. 2d 539, 542 (Fla. 1st DCA 1977). This service is deemed to give legally effective notice to the corporation or limited partnership of the pending litigation. Cam-La, Inc. v. Fixel, 632 So. 2d 1067, 1068 (Fla. 3d DCA 1994). In addition, “Service is not vitiated by the registered agent's failure to give the corporation notice that it had received suit papers on its behalf.” Id. The characterization of service on a fictional entity as “personal service” means a plaintiff does not need to comply with the additional requirements of substituted service, nor is a plaintiff required to ensure that the agent notifies the entity of such service or otherwise confirm the entity’s actual notice of the litigation. Id. Thus, complying with section 605.0904(6), Florida Statutes, and properly serving the Secretary of State is deemed legally sufficient to effectuate service on the LLC and comply with due process requirements.

Accordingly, in the case before us, service on the Secretary of State is deemed to give notice to Moon, LLC (the unregistered, foreign LLC), even if the Secretary of State fails to give Moon LLC notice that the Secretary of State has been served. Moon, LLC is already on notice pursuant to section 605.0904(6) that, as an unregistered foreign LLC doing business in Florida, it is subject to being served with

process through the Secretary of State. The burden is on Moon, LLC to register to do business within the State of Florida, and the burden is on Moon, LLC to regularly check with the Secretary of State, which is required to “keep a record of each process, notice, and demand served pursuant to this section and record the time of and the action taken regarding the service.” § 605.0117(6), Fla. Stat. (2018).

In addition, we find the cases cited by Moon, LLC - Jupiter House, LLC v. Deutsche Bank Nat’l Tr. Co., 198 So. 3d 1122 (Fla. 4th DCA 2016); Green Emerald Homes, LLC v. Nationstar Mortgage, LLC, 210 So. 3d 263 (Fla. 2d DCA 2017); and Green Emerald Homes, LLC. V. Green Tree Servicing LLC, 230 So. 3d 607, 608 (Fla. 4th DCA 2017) – to be distinguishable. These three cases involved substituted service of process on a registered entity pursuant to section 605.0017. All three cases involved domestic LLC's. Under the statute in those cases, the Secretary of State can be served as a last resort for service of process where that entity’s registered entity (or its member, manager or designated employee) cannot be served in the exercise of due diligence, but not as a statutorily-appointed agent of the entity as in section 605.0904. On the other hand, section 605.0904(6) makes the Secretary of State the statutory equivalent of the “designated agent” of the LLC for service of process purposes. Under these circumstances, service on the Secretary of

State is “personal service” or “perfected service” on the LLC, not substituted service.¹

As a result, compliance by appellants with section 605.0904(6) results in perfected service on Moon, LLC, the unregistered foreign LLC. Thus, the default final judgment against Moon, LLC is not void. And although Moon LLC moved to vacate the default judgment under rule 1.540(b)(1), its motion had to be filed within one year, and it was not. There is no dispute that Moon, LLC had actual notice of the default judgment thirteen months before it moved to vacate the default, and it waited almost two years from the date of the final judgment before it filed its motion to vacate, which shows a lack of due diligence in seeking relief. Cam-La, Inc., 632 So. 2d at 1068-69. Thus, Moon, LLC did not meet the requirements for relief from the default final judgment.

Lastly, as appellants’ correctly contend, on *de novo* review of the trial court’s statutory construction in this case, the trial court failed to harmonize section 605.0117 with section 605.0904(6). This rendered section 605.0904(6) meaningless.

¹ We note that although there is no case directly on point in Florida, appellants do cite to a federal case from the Eastern District of Tennessee where the judge ruled on a similar statute to section 605.0904(6), providing for original service on an LLC. See Arch Wood Protection, Inc. v. Flamedxx, LLC, 2012 WL 1071144 (E.D. Tenn. Feb. 22, 2012). In Arch Wood, the Tennessee statute in question provided that were a foreign LLC fails to obtain a certificate of authority, the department of state becomes the foreign LLC’s agent for purposes of effectuating service of process, similar to section 605.0904(6). Id. at *7. The federal court in Arch Wood found that the statute in that case provided for original service. Id. at *7-8

See Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992); Emami v. Progressive Brands, Inc., 225 So. 3d 983, 987 (Fla. 3d DCA 2017); DMB Inv. Trust v. Village of Islamorada, 225 So. 3d 312, 317 (Fla. 3d DCA 2017).

Accordingly, we hold that section 605.0904(6) is an original service provision, and thus, substitute service is inapplicable here where Moon, LLC, as a foreign LLC, failed to have a certificate of authority to transact business in Florida and was sued for business transacted in this state. We thus reverse the trial court's order granting Moon, LLC's motion to vacate default and default final judgment and remand the case with instructions to reinstate the default and default final judgment against Moon, LLC.

Reversed and remanded with instructions.