

**IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION**

BANK OF AMERICA,

Appellant/Plaintiff

vs.

ANDRE COKELEY,

Appellee/Defendant

Appeal Number: 009-001 AP-88A
County Case: 09-000395-SC-SPC
UCN: 522009AP000001XXXXCV

Opinion filed _____

Appeal from Final Judgment
Pinellas County Court of the Sixth Judicial Circuit.
The Honorable Kathleen Hessinger

Mark W. Rickard
Jacobson, Sobo & Moselle
Attorney for Appellant

ORDER AND OPINION

THIS CAUSE came before the Court on appeal, filed by Bank of America (“Bank”) from the Order entered December 18, 2008, denying Bank’s Motion for Default. The trial court determined that substitute service for the Defendant, Andre Cokeley, was improper because Cokeley did not operate or conduct business in Florida. Upon review of the appellant’s brief and relevant case law, the Court hereby affirms the Order as set forth below.

Cokeley is a resident of Florida who opened a personal, student, checking account with Bank that went into default. Bank filed a complaint against Cokeley, but was unable to properly serve Cokeley due to incorrect addresses. Bank then amended its Complaint, alleging that Cokeley concealed his whereabouts or avoided service of summons and complaint. In addition,

the Amended Complaint also alleges that the action arises from Cokeley's business activity in Florida and therefore, service upon the Secretary of State as the agent of Cokeley is acceptable. After serving the Secretary of State, Cokeley did not respond and Bank filed a Motion for Default. The Motion for Default was denied because the court found that failing to pay an overdraft does not constitute "operating, conducting, engaging in, or carrying on a business or business venture in the state." The lower court held that it was not the intent of the legislature to include any type of business activity, such as personal business activity, which if broadly interpreted would subject any person to substitute service under the statute (A. 11).

On appeal, Bank contends that the lower court erred in denying the Motion for Default for two reasons: (1) establishing and maintaining a bank account is a business activity and (2) substitute service is appropriate for resident defendants who conceal his or her whereabouts and engage in business activities in the state. The proper standard of review for the interpretation and application of Florida law regarding substitute service is *de novo*. See Armstrong v. Harris, 773 So.2d 7 (Fla. 2000).

Florida State Section 48.181 allows substitute service on the Secretary of State for "a resident defendant who ... conceals his or her whereabouts and who engages in or carries on a business venture in the state." Mecca Multimedia, Inc. v. Kurzbard, 954 So.2d 1179, 1182 (Fla. 3d DCA 2007). Bank contends that only a finding of concealment is necessary and that the business requirement is moot because Cokeley is a Florida resident, which exposes Cokeley to minimum contacts. However, the Statute has not been interpreted to mean that business activities and residency are interchangeable. In addition, the maintenance of a bank account, even if used for a solitary business purpose, is a contact "too tenuous to support an assertion of jurisdiction." La Reunion Francaise v. La Costena, 818 So.2d 657, 659 (Fla. 3d DCA 2002) (finding that a

Honduran insurance broker's maintenance of a singular Florida bank account used to collect premiums in Florida was not sufficient to support jurisdiction under Section 48.181). Therefore, resident defendants must both (1) conceal his or her whereabouts and (2) engage in or carry on a business venture in the state in order for substitute service on the Secretary of State to be proper under Section 48.181.

Bank claims that Cokeley falls under Section 48.181 because Cokeley engaged in business by opening a bank account. Bank relies on Bank of America v. Saint-Vil, 15th Circuit Case No. 502006AP000036XXXMB (March 2007) which held that the defendant had engaged in business in the state when he opened a bank account. This Court agrees with the lower court in declining to follow Saint-Vil. The court in Saint-Vil relied upon Commerce Bank v. Taylor, 639 So.2d 1058 (Fla. 3d DCA. 1994), which held that a promissory note in the amount of \$400,000 constituted engaging in a business venture, and Horace v. American Nat. Bank & Trust Co., 251 So.2d 33 (Fla. 4th DCA 1971), which held that opening a corporate checking account constituted doing business in Florida. These cases are distinct from the present case because Cokeley's account is a personal banking account, not a promissory note nor a corporate checking account. Therefore, Cokeley's personal banking account cannot be construed to show participation in a business or business related venture within Florida.

Since it has not been shown that Cokeley engages in or carries out a business or business venture in Florida, it is unnecessary to evaluate whether or not he has concealed his whereabouts. Bank also argues that Florida Statute Section 48.161 applies to this case; however, Bank failed to present this argument in the Amended Complaint at the trial level. Therefore, this Court cannot review the issue.

Additionally, Bank contends that the lower court erred because the trial court cannot raise defenses for the defendant in a motion for default; however, without appropriate service of process, effectively rendering personal jurisdiction nonexistent, any judgment or default granted would be void. See Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n, 968 So.2d 658, 665 (Fla. 2d DCA 2007); Del Conte Enterprises, Inc. v. Thomas Publ'g Co., 711 So.2d, 1268, 1269 (Fla. 3d DCA 1998). The trial court, finding no service of process was made on Cokely, correctly denied Bank's Motion for Default.

Therefore, it is

ORDERED AND ADJUDGED that the Order denying the Motion for Default is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida this 19
day of June 2009.

Original opinion entered by Circuit Judges Pamela A.M. Campbell, George W. Greer, & John A. Sch

Copies furnished to:
Judge Kathleen Hessinger

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