

County Civil Court: CIVIL PROCEDURE – Service of Process —The record does not support the finding that Appellees demonstrated facially valid service of process. It was therefore error to place the burden of proof on Appellant to demonstrate insufficient service of process in the trial court below. Reversed and remanded. *James Geary v. David Illingworth and Rosario Pitts*, No. 14-AP-0014-ES (Fla. 6th Cir. App. Ct. November 20, 2015).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

JAMES GEARY,
Appellant,

UCN: 512014AP0014APAXES
Appeal No: 2014-AP-0014-ES
L.T. No: 2014-SC-0963-ES

v.

**DAVID ILLINGWORTH and
ROSARIO PITTS,**
Appellees.

_____/

On appeal from County Court,
Honorable Candy VanDercar,
Andrew Mayts, Jr., Esq.,
for Appellant,
David Illingworth and
Rosario Pitts,
Pro Se.

ORDER AND OPINION

The Court finds it was error to place the burden of proof on Appellant to demonstrate insufficient service of process in the trial court below, when the record does not support a finding that Appellees demonstrated facially valid service of process. The order of the trial court is reversed and the cause is remanded with directions.

STATEMENT OF THE CASE AND FACTS

Appellant appeals the trial court's order denying a Motion to Quash Service of Process and to Vacate Final Judgment. On April 17, 2014, Appellees filed a small claims action against Appellant, a resident of California, and a summons was issued by

the clerk on the same day. On May 2, 2014, an unknown individual referred to as John Doe was allegedly served by substitute service at Appellant's residence in California with the Summons and Notice to Appear for Pretrial Conference. The affidavit of service states that a co-resident of 372 N. Orlando Ave., Los Angeles, CA 90048, was served at 8:23 p.m. on May 2, 2014, that the individual was a white male, approximately 65 years of age, weighing 200 pounds, with brown hair and wearing glasses. The affidavit states the individual was evasive and refused to provide his name and refused to state whether the defendant was married or in the military service.

On June 6, 2014, the trial court entered a default judgment in favor of Appellees, based on Appellant's failure to appear at the pre-trial conference after proper notice. Appellant claims to have received notice of the action for the first time when the default judgment was entered and mailed to his residence in California. On June 11, 2014, Appellant requested the Final Judgment be set aside based on the alleged lack of notice. A hearing was had on Appellant's motion to vacate final judgment on October 13, 2014. Appellant submitted an affidavit stating that he was not personally served, and that there was no person living at his residence that met the description of the individual served. The trial court issued an order denying Appellant's motion, finding that a mere denial of service is ineffective to meet the clear and convincing standard of proof that Appellant did not receive notice. Appellant now seeks review in this Court.

STANDARD OF REVIEW

A trial court's ruling on a motion to quash service of process is reviewed de novo. *Baker v. Stearns Bank, N.A.*, 84 So. 3d 1122, 1125 (Fla. 2d DCA 2012).

LAW AND ANALYSIS

Appellant claims he never received service of process and therefore the default judgment was void for lack of personal jurisdiction. The record does not demonstrate proof of service was filed in this matter. Appellees relied on two affidavits of service submitted by the process server. Appellant claims the affidavit of service is invalid on its face because it lacks the date and time the process came to hand, and lacks the name of the person on whom it was served. The first affidavit of service states that a co-resident was served at 8:23 p.m. on May 2, 2014, describes the individual as a white

male approximately 65 years of age, weighing 200 pounds, with brown hair and glasses, and states the individual was evasive and would not provide his name. The second affidavit of the process server submitted by Appellees restates the information included in the first affidavit of service, and further states that the process server visited Appellant's residence several times, and that a copy of the summons and notice to appear was mailed to Appellant as required by California law.

The trial court denied the motion, finding that a simple denial of service did not meet the burden of clear and convincing evidence that Appellant did not receive notice, and that the initial affidavit was sufficient to demonstrate valid service. Appellant filed a motion for rehearing which the court denied. Appellant contends the trial court improperly placed the burden on Appellant to show by clear and convincing evidence that the service of process delivered to John Doe as co-resident was invalid, because the affidavit of service is insufficient to demonstrate valid service.

The party seeking to invoke the jurisdiction of the court has "the initial burden to sustain the validity of service." *Baker*, 84 So. 3d at 1126. This burden is satisfied by proof of the return of service that is regular on its face. *Id.* The burden then shifts to the party contesting the validity of service "to make a prima facie showing by clear and convincing evidence that the substituted service was defective." *Id.*

Appellant correctly asserts the affidavit of service in this case was insufficient because it does not include the date and time the process came to hand or the name of the person on whom it was served. See § 48.21, Fla. Stat; *Herskowitz v. Sullivan*, 411 So. 2d 1359, 1360 (Fla. 3d DCA 1982). "The party who seeks to invoke the court's jurisdiction bears the burden of proving proper service," which "requires the party to demonstrate that the return of service is, under section 48.21, facially valid or regular on its face." *Koster v. Sullivan*, 160 So. 3d 385, 389 (Fla. 2015). "A return of service that is regular on its face must include the statutory factors contained in section 48.21." *Id.*¹

¹ Appellant further claims the service was invalid because it omits the statutory requirement that the process server place his or her initials and the process server ID number on the process served. See § 48.031(5), Fla. Stat. Appellant states that a copy of the summons allegedly served by substitute service was never provided to the trial court. The affidavit of service only states that the date and hour of service were placed on the process, but does not state that the ID number and initials were also included on the process. See *Re-Employment Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 471 (Fla. 5th DCA 2007) (holding that "courts require strict construction of, and compliance with, the provisions of statutes governing service of process").

The affidavit of service is insufficient as a matter of law to demonstrate valid service. Because Appellees did not meet the burden of proving valid service pursuant to § 48.21, Fla. Stat., it was improper to place the burden on Appellant to demonstrate service was defective. The order of the trial court is reversed and the cause is remanded with directions to grant the motion to quash service of process and vacate the final judgment.

CONCLUSION

The record does not demonstrate facially valid service was effected in this matter. The affidavit of service is insufficient to demonstrate strict compliance with the statutory requirements. The order of the trial court is reversed and the cause is remanded with directions.

It is ORDERED AND ADJUDGED that the order of the trial court is hereby REVERSED and the matter is REMANDED with directions to the trial court to grant the motion to quash service of process, vacate the final judgment and to conduct any further proceedings as are appropriate.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 20th day of November, 2015.

Original order entered on November 20, 2015, by Circuit Judges Linda Babb, Susan Barthle and Shawn Crane.