IN THE SUPREME COURT OF FLORIDA

GERALD R. SHURMAN,
a/k/a Gerald R. Sherman,

Petitioner/Defendant,

S.Ct. Case No.: SC96,918
5th DCA Case No.: 5D99-556

vs.

ATLANTIC MORTGAGE & INVESTMENT CORPORATION,

Respondent/Plaintiff.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEALS FOR THE FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

ANNE S. MASON
JENNIFER S. EBANKS
MASON & ASSOCIATES, P.A.
17757 U.S. Hwy. 19 North
Mangrove Bay, Suite 500
Clearwater, FL 33764
(727) 538-3800
Counsel for Atlantic
Mortgage & Investment Corp.

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PRELIMINARY STATEMENT

Respondent/Plaintiff is referred to in this brief as "Atlantic." Defendant/Petitioner is referred to as "Shurman." References to the trial court record are designated as "R1:[page]." References to the record submitted to this Court by the Fifth District Court of Appeals are designated as "R2:[page]."[1] References to the appendix are designated as "A.[document number and page]." References to Shurman's brief on the merits are designated "Br.[page]." All emphasis is added unless otherwise specified.

CERTIFICATE OF FONT SIZE

The font used in this brief is "Courier" 12 point.

[1] Although the record on appeal is not designated by Volumes 1 and 2, the above-referenced designation system will be used to avoid confusion since pages 1 through 29 are duplicated in record because the Fifth District did not re-paginate the trial court record when incorporating it into the record on appeal before this Court.

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STATEMENT OF THE CASE AND FACTS

Atlantic accepts Shurman's statement of the case and facts with the following exceptions and additions.

The action below was a residential mortgage foreclosure case commenced by Atlantic in March 1998. R1:1-15. The mortgaged property was owned by Shurman and his wife. Service of process was effected on Shurman's wife personally and on Shurman by substitute service on his wife at their home. R1:151; R2:7; A.1, p.1; A.2, p.6, 13.[2] At the time of service, Shurman was in prison. R1:152; R1:113, Exhibit "A"; A.2, p.6.

According to Shurman, his wife failed to tell him about the foreclosure action. Id.[3] As a result, he did not file any response to the complaint, and because the wife did not answer either, defaults were entered against them in May 1998. R1:34.

Atlantic moved for and was granted a final summary judgment of foreclosure and the property was sold at a foreclosure sale in June 1998 to the second mortgagee. R1:43. Shurman contends he learned about the suit from his wife after judgment was entered and the property was sold. R1:152; A.2, p.6. Seven months later

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[2] Appendix 2 is a transcript from the trial court hearing on Shurman's motion to set aside the judgment. It does not have a record cite number because it was added to the record after the index to the record on appeal was prepared. See, A.3.

[3] In his brief, Shurman maintains that he and his wife were separated and that Atlantic knew he was not living in the home at the time service was effected. Br.9, 10. There is, however, no evidence in the record to support these contentions.

(R1:153; A.2, p.19), Shurman filed a motion to set aside the foreclosure judgment (R1:68-83) which was set for an evidentiary hearing. R1:84-85.

At the hearing, Shurman's testimony as well as his wife's demonstrated that service was accomplished on Shurman via his wife where he resided before prison and where his family still lived. R1:152; A.2, p. 6, 13. In addition, the trial court found that Shurman had not demonstrated any meritorious defense to the action. R1:153. As a result, Shurman's motion to set aside the foreclosure judgment due to defective service was denied. R1:151-154.

Shurman appealed to the Fifth District Court of Appeals which affirmed the trial court judgment. R.2:7-10. Shurman then appealed to this Court which accepted jurisdiction.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over this matter because the Fifth District's opinion does not directly and expressly conflict with any Florida Supreme Court or district court case.

Even if the Court retains jurisdiction, it should affirm the decision below because the Fifth District correctly upheld the trial court's denial of Shurman's motion to set aside the final judgment of foreclosure. Atlantic obtained valid service of process on Shurman under Florida law by serving substitute process on his wife at the home they shared before Shurman was incarcerated and in which his family continued to reside after his incarceration. An imprisoned party's "usual place of abode" under § 48.031, Florida Statutes, is where the party resided prior to incarceration if the party's family continues to reside there when process is served.

Finally, any decision that Shurman's service was invalid despite Atlantic's compliance with § 48.031(1)(a), Florida Statutes, would be a departure from existing law effectively creating an exception to the service of process statute for prisoners. As a result, Atlantic should not be bound by a new construction of the statute of which it had no notice at the time service was perfected. Instead, the Fifth District Court of Appeals' decision should be affirmed and the ruling be given only prospective force.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THIS CASE SINCE THERE IS NO CONFLICT IN THE COURTS CONCERNING THE APPROPRIATE METHOD OF SERVICE OF PROCESS ON PRISONERS.

Shurman contends that this Court has jurisdiction because the opinion below conflicts with two decisions of this Court, other opinions from the Fifth District, and opinions from the Fourth District Court of Appeals. Br. at 11. The cases he cites, however, are factually distinguishable and simply do not address the precise legal issue involved here. As such, they provide no conflict jurisdiction.

The facts of this case are straightforward. Shurman argues that the trial court erred in refusing to set aside the foreclosure judgment due to invalid service of process upon him. Section 48.031, Florida Statutes, sets forth the requirements:

> Service of original process is made by delivering a copy of it to the person to be served ... or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents.

§ 48.031(1)(a), Florida Statutes (1998). Atlantic served Shurman by delivering a copy of the process to his wife at the home they shared for twelve years before Shurman was incarcerated. R1:151-52; R2:7, 9; A.1, p.1; A.2, p.6, 13. When doing so, the process server explained the contents of the documents to Shurman's wife.

R1:113, Exhibit "A."

Neither Shurman nor his wife disputed that service was made on him in this manner during the trial court proceedings. R1:71, 151-52; A.2, p.6, 13. Shurman nevertheless now asserts that his family home was not his "usual place of abode" within the statute's meaning because he was in prison when the service was effected. The trial court rejected Shurman's contention, holding service was valid under the statute. R1:151-154. The Fifth District affirmed. R2:7-10.

Shurman argues that this holding conflicts with State ex rel Merritt v. Heffernan, 195 So. 145 (Fla. 1945), a case that involved a vacationing northerner rather than a prisoner. There, service on the defendant was deemed valid when it was made on the defendant's wife (when the defendant was traveling to another state) at their vacation home where the family was staying, even though the defendant's permanent residence was in another state. In upholding service, the Court found that the defendant's place of abode (versus his residence) was where his family was living, especially since there was no evidence that he did not intend to return to the family's vacation home. Id. at 147-49.

Heffernan, then, is legally consistent with the Fifth District's decision in this action and does not create conflict jurisdiction. Here, Shurman was residing in prison, but his place of abode was where he had lived with his family before he

was imprisoned, where his family continued to reside and where he presumably intended to return after his release. Although Shurman may have "resided" somewhere else, he did not voluntarily establish any place of abode other than his family home. See, Minick v. Minick, 149 So. 483, 488 (Fla. 1933) (suggesting "usual place of abode" is synonymous of "domicile" rather than "residence").

Shurman is also wrong in claiming that the Fifth Circuit decision below conflicts with that of Page v. Hollingsworth, 157 So. 887 (Fla. 1934). The Page Court addressed a statute that required service of process on prisoners to include service on the commissioner of agriculture. Page, 157 So. at 290. The requirements of the statute (which has been repealed) were not met when the plaintiff failed to serve the commissioner. Id. Here, Atlantic complied with the objective requirements of the substitute service statute. § 48.031(1)(a), Florida Statutes. Shurman just does not like the construction of "usual place of abode."

Shurman next cites several Fifth District opinions that he deems in conflict with the Fifth District's opinion in this case. Br. at 11. The first problem with his position is that intra-district conflict is not a basis for this Court's discretionary jurisdiction. See, Fla. Const. Art. V, § 3(b); Rule 9.030(a)(2), Fla.R.App.P. Further, when the cases are read with care, it is

clear that they are factually distinguishable, do not support Shurman's position, and do not establish a conflict.

For instance, the court in Hovarth v. Aetna Life Ins. Co., 634 So. 2d 240 (Fla. 5th DCA 1994) simply held that valid process was not effected where the person served did not actually reside in the defendant's place of abode as required by § 48.031, Florida Statutes Id. at 240. In this case, it is undisputed that Shurman's wife did reside in Shurman's place of abode, so Hovarth is inapposite.

The cases of Floyd v. Federal Nat'l Mortgage Assn., 704 So. 2d 1110 (Fla. 5th DCA 1998) and Wagner v. Vigor Island Corp., 443 So. 2d 469 (Fla. 5th DCA 1984) are also of no help. Floyd addressed whether there was proper constructive service of process on a decedent's heirs under provisions of chapter 49 of the Florida Statutes. Floyd, 704 So. 2d 1110. Wagner involved reversal of a summary judgment entered against a party who had not been given notice of the hearing. Wagner, 443 So. 2d at 470. Since this action addresses service of process under the substitute service provisions of § 48.031, Florida Statutes, nothing in Floyd can be deemed inconsistent with the Fifth District's decision in this case. Likewise, the Wagner case did not address service of process at all. As such, neither case creates any type of intra-district conflict with the Fifth District's opinion appealed from here.

Finally, the Fourth District cases of Berchtold v.Griffin, 592 So. 2d 377 (Fla. 4th DCA 1992) and Kennedy v. Richmond, 512 So. 2d 1129 (Fla. 4th DCA 1987) lend Shurman no support. See, Br. at 11. Berchtold reversed a summary judgment where there was no notice of the hearing provided to the losing party, an issue not relevant in this case. Berchtold, 592 So. 2d 377. Kennedy involved service of process on the defendant by serving his business partner who was not shown to be authorized to accept service on the defendant's behalf. Id. at 1130. In this case, it was Shurman's wife who was served with process at their usual place of abode, a valid form of substitute service under § 48.031, Florida Statutes. Neither Kennedy nor Berchtold, therefore, conflict with the Fifth District's decision below such that this Court's discretionary jurisdiction could be invoked.

Since there is no express and direct conflict between the opinion below and the cases cited by Shurman (or located by Atlantic) to support a conflict, this Court lacks discretionary jurisdiction to hear this case. See, Fla. Const. Art. V, § 3(b); Fla. R. App. P. 9.030(a)(2).

II. THE FIFTH DISTRICT CORRECTLY UPHELD THE LOWER COURT'S DENIAL OF SHURMAN'S MOTION TO SET ASIDE FINAL JUDGMENT OF FORECLOSURE BECAUSE SUBSTITUTE SERVICE ON HIS WIFE AT HIS PLACE OF ABODE CONSTITUTED VALID SERVICE.

A. The Fifth District correctly concluded that "usual place of abode" means where the party voluntarily resided prior to incarceration and where his family

continues to reside.

The essence of Shurman's appeal is that his "usual place of abode" for service of process purposes was not where he had voluntarily lived with his family before going to jail, but was instead the prison where he resided at the time of service. In rejecting this construction of the term "place of abode," the Fifth District cited with approval the trial court's reliance on Bull v. Kistner, 135 N.W.2d 545 (Iowa 1965) quoted in Araujo v. Ramirez-Limon, 490 So.2d 1049, 1049 (Fla. 3d DCA 1986).[4] R2:7-8. Faced with identical facts to this case, the Kistner court construed the meaning of "usual place of abode" to mean "domicile" and observed that:

> where one voluntarily establishes a place of abode or residence but is prevented from occupying it, by acts of sovereign or otherwise, his place of abode is not changed.

Id. at 547 (quoting Bohland v. Smith, 7 F.D.R. 364, 365 (E.D. Ill. 1947)). Because prison is a place of punishment which prevents the defendant from occupying his chosen residence, the court reasoned, the family home remains the defendant's usual place of abode. Id. at 548.

When adopting that reasoning and approving Atlantic's service of process in this case, the Fifth District noted that "the Kistner rationale was followed in Montes v. Seda, 599 N.Y.S.2d 401, 403 (N.Y. Sup. Ct. 1993), aff'd, 626 N.Y.S. 2d 61 (N.Y.A.D. 1 Dept. 1994). R2:9; App. 1. There, the court held that if a person leaves a home for prison but that home continues to be occupied by other family members, that person does not

[4] In Araujo, service was invalidated when made on an incarcerated defendant by serving a family member at a new house to which the family had moved after the imprisonment and where the incarcerated defendant had never resided. Id. at 1049. Araujo cited Bull v. Kistner in comparison.

abandon the family home as his usual place of abode. Id. (citations omitted). As the Montes court explained:

> A degree of permanence and stability cannot be ascribed to a location to which the sovereign involuntarily places a person (at least in cases not involving long term imprisonment). Prison is where one resides as a means of punishment, segregation from the general society and away from one's home and family. It should not, in cases of a prisoner having a family home, be considered the person's dwelling or usual place of abode which, as indicated above, connotes a concept of permanency.[5]

Id. at 403. Cf., Saienni v. Oveide, 355 A.2d 707 (Del. Super 1976) (usual place of abode not same as domicile; where actually lives is controlling); Fidelity & Deposit Co. of Maryland v. Abagnale, 234 A.2d 511 (N.J. Super 1967) (place of abode is where one actually lives when served). The rationale was properly applied here.

The decisions of the Iowa and New York courts have added weight because they are consistent with cases interpreting the similar service of process provision contained in Rule 4(e)(2) of the Federal Rules of Civil Procedure. See, Rule 4(e)(2),

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[5] Shurman also asks the Court to determine when incarceration is long enough to be considered one's place of abode for purposes of the statute. Br.12, 25. However, this issue is not before the Court because there is nothing in the record establishing the length of Shurman's incarceration. Although Shurman claims he advised the trial court of his prison term at the evidentiary hearing, (Br. at 12) a review of the transcript reveals only the date of Shurman's incarceration (May 2, 1997, approximately nine months before he was served with process in this action) not the length of his sentence. A.2, p. 19. Per the address provided to the Clerk of this Court, Mr. Shurman is no longer in prison.

Fed.R.Civ.P. (service of process can be made pursuant to state law or by leaving a copy of the complaint and summons "at the individual's dwelling house or usual place of abode with some person of suitable age and discretion residing therein"). Those courts considering the issue under the federal rule have consistently held that incarceration does not change one's place of abode. E.g., Blue Cross and Blue Shield of Michigan v. Chang, 109 F.R.D. 669, 670 (E.D. Mich. 1986) (subscribing to holdings in Bohland and Davis); U.S. v. Davis, 60 F.R.D. 187, 188 (D. Neb. 1973) ("when person is imprisoned, his family residence, if any, remains his usual place of abode"); Bohland v. Smith, 7 F.R.D. 364, 365 (E.D. Ill. 1947). Shurman advances no cogent reason to apply a different logic here.

Since Shurman and his wife agree that he had resided at the subject property for twelve years before his imprisonment and his family continued to reside at the property well after he was imprisoned, R1:152; R2:9; A.2, p. 13, 21, the trial court properly concluded that Shurman's former home was his "usual place of abode" within the meaning of § 48.031(1)(a), Florida Statute. Substituted service upon his wife at their home, therefore, was perfectly valid, R1:152, and the Fifth District correctly affirmed this conclusion. R2:10.

Shurman nevertheless advances several additional grounds to urge a contrary ruling here. First, he points to language in the

Heffernan case discussed above with respect to conflict jurisdiction, quoting from a New Jersey case which held "the word abode means one's fixed place of residence for the time being when the service is made." Heffernan, 195 So. at 499-500. Shurman argues that "for the time being" must mean that his abode was prison because that is where he was when service was effected. Br. at 13, 19. But a fair reading of Heffernan shows that the court focused on where one's home truly is, not on where one happens to be at the time of service. Id. at 148. Thus, Shurman's suggestion that this Court disregard where his family resided at the time of the service (Br. at 13) is discredited by the very case upon which Shurman relies.

Shurman also suggests, however, that service was not proper on him via his wife because they were not living together and she was not informed of the contents of the papers served on her. (Br. at 20, 21). The statutory language Shurman relies on for his 'living together' claim, however, is not applicable -- it comes not from § 48.031(1)(a), the statute upon which this case depends, but on § 48.031(2)(a), which is not at issue in this case. See, § 48.031(2)(a), Florida Statutes (1998) (substitute service on spouse permitted anywhere in county when spouse requests it and spouses are living together). There is no evidence to support Shurman's other contention that his wife was not informed of the contents of the papers served on her. To the

contrary, the record below makes clear that the process server told her of the nature of the papers being served. R1:113, Exhibit "A."

Shurman's real complaint appears to be founded upon his wife's failure to tell him about the lawsuit. The rationale behind permitting substitute service in the first instance though is founded on the presumption that someone living at the defendant's place of abode who is over the age of fifteen (15) will tell the defendant about service of the action.[6] Cf., Clark v. Clark, 30 So. 2d 170, 172 (Fla. 1947) (process insufficient where shown no member of defendant's family knew where he was located). Neither the service of process statute nor due process requires a plaintiff to make sure that this notification in fact occurs. Thus, when Atlantic complied with § 48.031, Florida Statutes, by serving someone over 18 years of age (his wife) living at Shurman's place of abode, it was valid service even if Shurman did not receive actual notice. § 48.031(1)(a), Florida Statutes (1998). See, also, Magazine v. Bedoya, 475 So. 2d 1035, 1035 (Fla. 3d DCA 1985) (service on defendant's mother-in-law during a six week stay at the defendant's residence held valid);

[6] After all, where one's family lives is a reliable measure of where one's usual place of abode really is versus where one declares it to be in challenging service of process. Shurman's construction of the service of process statute is not only illogical, but unworkable in light of the effort lenders would be forced to expend to ascertain whether (and where) any given defendant is incarcerated.

Speer v. Wooddell, 340 So. 2d 524, 525 (Fla. 3d DCA 1976) (service on an individual who lived with the defendant for more than one year found to be effective substituted service); Barnett Bank of Clearwater N.A. v. Folsom, 306 So. 2d 186, 187-88 (Fla. 2d DCA 1975) (service on the wife of the defendant held valid substitute service even where defendant was never actually notified of the lawsuit).

B. The requirements of due process were met in this case.

Shurman finally urges reversal of the decision below on the basis that the substituted service on him violated due process. As he sees it, he "cannot be held responsible for his estranged wife's failure to inform him that a complaint was filed against him."[7] Br. at 23. Shurman, thus, asks this Court to read into the substitute service statute (or create) an exception for incarcerated prisoners whose family members do not inform them of lawsuits served in their absence.

No such exception is necessary, or warranted. The statute contains due process safeguards for all persons, including prisoners. Requiring that service be accomplished where a party has made his home and where his family resides, on a person who actually lives in that place of abode and who is over the age of

[7] Although Shurman refers to his wife as "estranged" there is no record evidence that she was at the time of service or that Atlantic had any reason to know this if it was in fact true.

15, § 48.031(1)(a), Florida Statutes (1998), provides strong assurances that the papers served will actually be delivered to the named defendant. That is enough. Due process does not require perfect notice. Folsom, 306 So. 2d at 187-88. Instead, it requires only procedures reasonably designed to give defendants notice. Id. (substitute service statutes have been upheld against attack on due process grounds (citing Milliken v. Meyer, 311 U.S. 457 (1940)); compliance with such statutes is valid method of acquiring jurisdiction over defendant even if defendant did not receive actual notice); Chang, 109 F.R.D. at 670.

In the end, Shurman's incarceration does not violate due process given these safeguards. This is especially true for those who, like Shurman, lived in their family home for many years prior to incarceration, who were still married at the time of service and whose family still lived in that same home.[8] Since Shurman clearly never intended to establish a place of abode anywhere other than where he had lived previously and where his family continued to live after he was incarcerated, that home remained his "place of abode" even though he was temporarily

[8] Although personal service on Shurman in prison may have been an alternative, it was not required. See, § 48.051, Florida Statutes (1998) (process to be served on prisoner). As the Fifth District noted, § 48.051 simply provides that prisoners are to be served in the same manner as other natural persons. R2:7 n.1; A.1. Other natural persons can be served in person or by substitute service. § 48.031, Florida Statues (1998).

absent from it.

Shurman's failure to receive actual notice of the suit was not the result of some constitutional infirmity in the substitute service statute, but instead was the result of his wife's failure to tell him about the suit. As such, since Atlantic literally complied with the requirements of § 48.031(1)(a), its service of substitute process on Shurman was valid. The trial court therefore had jurisdiction over him and properly denied his motion to set aside the default seven months after the final judgment of foreclosure was entered. The Fifth District's order upholding that decision was correct and should be affirmed.

III. ANY NEW RULE OF LAW ANNOUNCED SHOULD BE APPLIED PROSPECTIVELY ONLY.

If the Court accepts Shurman's interpretation of the service of process statute, such a decision should be applied prospectively only. A newly-created judicial exception for prisoners to the service of process requirements cannot be retroactively applied to Atlantic because it had no notice of it at the time it served process on Shurman. See, International Studio Apartment Association Inc. v. Lockwood, 421 So. 2d 1119, 1120 (Fla. 4th DCA 1983), rev. den., 430 So 2d 451 (Fla. 1983), cert. den., 464 U.S. 895 (1983) (where rights and positions of parties acting in reliance on statute or construction of statute upon new construction of statute, decision should be applied

prospectively), citing, Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944).

Atlantic was entitled to rely on a literal reading of § 48.031(1)(a), Florida Statutes, when obtaining a foreclosure judgment against Shurman, the sale of the property and the satisfaction of its lien. Thus, even if Shurman were entitled to relief from a judgment he challenged months after learning of it, any newly-created exception to the service of process statute for prisoners should be applied prospectively only and not to Atlantic in this case.

CONCLUSION

The Fifth District's decision affirming the trial court's denial of Shurman's motion to set aside final judgment should be affirmed.

MASON & ASSOCIATES, a
Professional Association

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Anne S. Mason
Florida Bar No. 472689
Jennifer S. Ebanks
Florida Bar No. 0896519
17757 U.S. Hwy. 19 North
Mangrove Bay, Suite 500
Clearwater, FL 33764
(727) 538-3800
Counsel for Respondent
Atlantic

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by First Class U.S. Mail this _____ day of October, 2000, upon: GERALD R. SHURMAN, 7204 Grace Road, Orlando, FL 32819.

_____

Anne S. Mason

96918_ans.wpd