IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50-2018-CA-002317

WALTER E. SAHM and
PATRICIA SAHM,

Plaintiffs,

v.

BERNSTEIN FAMILY REALTY, LLC and
ALL UNKNOWN TENANTS.

Defendants

(AMENDED) DEFENDANT'S RESPONSE TO PLAINTIFF'S RESPONSE TO MOTION FOR REHEARING

NOT A CERTIFIED COPY

COMES NOW, Defendants, JOSHUA ENNIO ZANDER BERNSTEIN, JACOB NOAH ARCHIE BERNSTEIN, and DANIEL ELIJSHA ABE OTTOMO BERNSTEIN, by and through their undersigned Attorney, pursuant to Fla.R.Civ.P.Rule 1.530, files this Motion for Rehearing as follows:

1. On (02-10-2022), the Plaintiff filed his Response to Defendants' Motion for Rehearing nearly a month after it what court ordered to response, and only after the Defendants filed their Motion for Order to Show Cause for the Plaintiff's failure to response pursuant to this Court's Order.
2. In the Plaintiff's Response to the Defendants' Motion for Rehearing, he fails to address or provide any law that would negate the main issues pled in the Motion for Rehearing, which include that he submitted a Final Judgment, falsely informing this Court that it was a consented Final Judgment. Furthermore, the Plaintiffs fail to respond to his failure to schedule a hearing on Attorney Fees, for the determination of whether or not they were reasonable as directed by this Court. Lastly, the Plaintiffs incorrectly cite that an affidavit

was not required for a summary judgment hearing. This is not conclusive of the arguments the Plaintiff failed to address in his response.

3. The Plaintiff has attempted to deviate from the major issues alleged in the Motion for Rehearing and takes it a step further by insinuating the Motion was so meritless that he found it difficult to answer. This appears to be an overly confident approach, based on his opinion rather then any substantive arguments of case law or law that would negate the Defendants arguments in their Motion for Rehearing.

4. The Defendants will not re-allege what has already been alleged in the Motion for Rehearing, as the Court has already been provided these arguments. However, the purpose of this Response is to point out the Plaintiff's failure to respond to any arguments with any law that would substantiate the Plaintiff's position as a prevailing position over the Defendants. Thus, this Court should find in favor of the Defendants.

I. AFFIRMATIVE DEFENSES OF FAILURE TO PROPERLY SERVE INDISPENSABLE PARTIES BFR AND BFR MEMBERS JOSH, JAKE AND DANNY BERNSTEIN WERE RAISED BY BOTH ELIOT BERNSTEIN AND COUNSEL LESLIE FERDERIGOS BEFORE THE SUMMARY JUDGMENT AND IN 1.530 BUT COUNSEL SWEETAPPLE FOR PLAINTIFF HAD NO RESPONSE AND SUMMARY JUDGMENT WAS IMPROPER ON THIS ISSUE ALONE

5. To be entitled to summary judgment, the movant must not only establish that there are no genuine issues of material fact regarding the parties' claims, but also the movant must either factually refute the affirmative defenses or establish that they are legally insufficient. Taylor v. Bayview Loan Servicing, LLC, 74 So. 3d 1115 (Fla. Dist. Ct. App. 2011) The standard of review of a trial court's entry of a summary final judgment is de novo. Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla.2000); Gee v. U.S. Bank Nat'l

NOT A CERTIFIED COPY

Ass'n, 72 So.3d 211, 213 (Fla. 5th DCA 2011). When reviewing a ruling on summary judgment, an appellate court must examine the record in the light most favorable to the nonmoving party. Suarez v. City of Tampa, 987 So.2d 681, 682 (Fla. 2d DCA 2008). **Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, conclusively show that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c).** *The party moving for summary judgment has the burden of showing the nonexistence of a genuine issue of material fact. Holl v. Talcott, 191 So.2d 40, 43 (Fla.1966).* Thus, Plaintiffs Walter and Patricia Sahm had the burden of proof as the moving party on Summary Judgment. **If affirmative defenses have been raised, the moving party must also either factually refute the affirmative defenses or establish that they are legally insufficient.** See Pavolini v. Williams, 915 So.2d 251, 253 (Fla. 5th DCA 2005) (quoting The Race, Inc. v. Lake & River Recreational Props., Inc., 573 So.2d 409 (Fla. 1st DCA 1991)).

6. Plaintiffs have neither met their burden of proof but also did not refute or even attempt to refute the affirmative defenses of failure to include an indispensable party and obtain personal jurisdiction over such parties by proper Service of process. **"A party opposing a motion for summary judgment has no initial obligation to submit affidavits or proof to establish its affirmative defenses.** Stop & Shoppe Mart, Inc. v. Mehdi, 854 So.2d 784, 786 (Fla. 5th DCA 2003). **It is only when the party moving for summary judgment has properly met its burden of proof demonstrating the nonexistence of a genuine issue of**

NOT A CERTIFIED COPY

material fact that the opposing party is then obligated to prove the existence of an issue of material fact. Lindsey v. Cadence Bank, N.A., 135 So.3d 1164, 1167 (Fla. 1st DCA 2014) (stating that "if the moving party meets its burden of proof, it is 'incumbent upon the party against whom the judgment is sought to demonstrate, by affidavit or otherwise, the existence of an issue of material fact in order to avoid having a summary judgment rendered against him' " (quoting Connell v. Sledge, 306 So.2d 194, 196 (Fla. 1st DCA 1975))). Because Bank failed to meet its burden of proof to factually refute the affirmative defense or establish that it was legally insufficient, Colon had no obligation to submit competent evidence in opposition to Bank's motion for summary judgment." See, COLON v. JP MORGAN CHASE BANK NA No. 5D14–1191. Decided: February 06, 2015.

II. BECAUSE PLAINTIFFS AND COUNSEL SWEETAPPLE WHOLLY FAILED TO MEET IT'S INITIAL BURDEN BY FAILING TO INCLUDE ANY SWORN AND ADMISSIBLE EVIDENCE DOCUMENTS 40 DAYS BEFROE THE HEARING THUS DENYING SUMMARY JUDGMENT, NONE OF THE DEFENDANTS HAD AN OBLIGATION TO REPLY AND JUDGE KASTRANAKES ORDER GRANTING JUDGMENT IS VOID

7. **It is well established that in an action to foreclose a mortgage the owner of the fee simple title is an indispensable party.** See 37 Fla.Jur.2d Mortgages and Deeds of Trust § 296, at 262 n. 26. ***This is so even where the titleholder is a minor.*** (A ward is a necessary party to a suit affecting his title to real property and cannot be bound by such an action brought against the guardian alone.)The fee simple title holder is an indispensable party in an action to foreclose a mortgage on property. Oakland Props. Corp. v. Hogan, 96 Fla. 40, 117 So. 846, 848 (1928) ("**One who holds the legal title to mortgaged property is not only necessary, but is an indispensable, party defendant in a suit to foreclose a mortgage.")**; Cmty. Fed. Sav. & Loan Ass'n of Palm Beaches v. Wright, 452 So.2d 638, 640 (Fla. 4th

NOT A CERTIFIED COPY

DCA 1984). **"Indispensable parties are necessary parties so essential to a suit that no final decision can be rendered without their joinder."** Hertz Corp. v. Piccolo, 453 So.2d 12, 14 n. 3 (Fla.1984). **Because Lesa Investments, the undisputed owner, was not a party to the first suit, the initial foreclosure judgment could not result in a valid sale, as the owner of the fee simple title was an indispensable party. See,** Community Fed. Svgs. and Loan Ass'n v. Wright, 452 So.2d 638, 640 (Fla. 4th DCA 1984). Both BFR, LLC and Joshua, Jacob and Danny Bernstein are indispensable parties as owners of the property and the Members of BFR, LLC the entity which owns the property and thus as Service was never proper on them as indispensable parties the action must be Dismissed. The sufficiency of service of process in civil litigation is controlled by Florida Rule of Civil Procedure 1.070 and Chapter 48, Florida Statutes (1983), whether or not the party is a minor or other incompetent. **When a motion for leave to amend with the attached proposed amended complaint is filed, the 120-day period for service of amended complaints on the new party or parties shall begin upon the entry of an order granting leave to amend.** See Florida Rule of Civil Procedure 1.070(j) While it is true that it is no longer necessary to appear specially to contest the jurisdiction of the court in order to preserve the defense of lack of jurisdiction, it is also true that where some affirmative action is taken it must be coupled with an objection to the jurisdiction of the court over the person or such jurisdictional inadequacy is waived. Green v. Hood, 120 So.2d 223 (Fla. 2d DCA 1960); Fla.R.Civ.P. 1.140(h).

8. Both myself Eliot Bernstein and my wife Candice Bernstein appeared and contested Service and jurisdiction and maintained the objection. It is axiomatic that in a mortgage foreclosure action a plaintiff must plead and prove the occurrence of all conditions precedent. See

NOT A CERTIFIED COPY

Konsulian v. Busey Bank, N.A., 61 So. 3d 1283, 1285 (Fla. 2d DCA 2011).SEE, Smith v. Reverse Mortg. Sols., Inc., Third District Court of Appeal State of FloridaJul 15, 2015 No. 3D13-2261 (Fla. Dist. Ct. App. Jul. 15, 2015)"[A] mortgagee's right to the security for a mortgage is dependent upon its compliance with the terms of the mortgage contract, and it cannot foreclose until it has proven compliance." DiSalvo v. SunTrust Mortg., Inc., 115 So. 3d 438, 439 (Fla. 2d DCA 2013). SAHM NEVER ATTACHED ANY DOCUMENT IN THE AMENDED COMPLAINT SHOWING NOTICE OF THE DEFAULT ON THE MORTGAGE to BFR, LLC AND THE SUMMARY JUDGMENT NEVER HAD "AUTHENTICATED EVIDENCE" OF THE NOTICE OF DEFAULT TO BFR - THIS DEFEATS FORECLOSURE Fla. R. Civ. P. 1.510(a) The court shall state on the record the reasons for granting or denying the motion. The statements of This Courtfails to state on the Record a proper basis for Summary Judgment and thus violates 1.510. The Record fails to state who is and was the Owners of the Property as indispensable parties or how the Service was proper on these parties and fails to state who defaulted and when and for how much or have proof in the Record to support the Judgment in authenticated form. (**Fla. R. Civ. P. 1.510(b)The movant must serve the motion for summary judgment at least 40 days before the time fixed for the hearing.**The Record is clear that Counsel Sweetapple for Plaintiffs wholly failed to Serve a proper motion for Summary Judgment 40 days before the Hearing that complied with 1.510(c) below and wholly failed to Serve Counsel Leslie Ferderigos for Joshua, Jake and Danny Bernstein altogether. What is further clear and Sanctionable against Counsel Sweetapple is his continuing failure to respond to these allegations even when Ordered to do so by the Court. **Fla. R. Civ. P. 1.510(c)(5)Timing for Supporting Factual Positions. At the time of filing a motion for summary judgment, the**

NOT A CERTIFIED COPY

movant must also serve the movant's supporting factual position as provided in subdivision (1) above. BOTH COUNSEL SWEETAPPLE FOR PLAINTIFFS' AND THE COURT HAVE ACTUAL KNOWLEDGE THAT THE THIRD AMENDED COMPLAINT WAS NOT SWORN AND NO SWORN AFFIDAVITS WERE SUBMITTED ON SUMMARY JUDGMENT NOR ANY OF THE PRIOR HEARINGS HAD ANY WITNESS SWORN UNDER OATH AND THUS THE COURT HAD NO BASIS TO ISSUE SUMMARY JUDGMENT WHICH IS VOID AND A NULLITY

9. **"Unauthenticated documents cannot be used in support of a motion for summary judgment ."** Green v. JPMorgan Chase Bank, N.A., 109 So.3d 1285, 1288 n. 2 (Fla. 5th DCA 2013); see also DiSalvo, 115 So.3d at 440; Morrison v. U.S. Bank, N.A., 66 So.3d 387, 387 (Fla. 5th DCA 2011) (holding that the bank's filing of an unauthenticated notice letter failed to support summary judgment where the defendant asserted she had not received a notice of default); Bryson v. Branch Banking & Trust Co., 75 So.3d 783, 786 (Fla. 2d DCA 2011) "The unauthenticated copies of default letters purportedly sent to Bryson by BB & T were insufficient for summary judgment purposes because only competent evidence may be considered in ruling on a motion for summary judgment." Bifulco v. State Farm Mut. Auto. Ins. Co., 693 So.2d 707, 709 (Fla. 4th DCA 1997) ("Merely attaching documents which are not 'sworn to or certified' to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in Fla. R. Civ. Proc. 1.510(e)."). It is undisputed that no authenticated pleadings were submitted on Summary Judgment in compliance with the Statute and the Judgment must now be Vacated.

NOT A CERTIFIED COPY

10. **Personal Jurisdiction and Service of Process.** Under Florida law, service of process and personal jurisdiction are two distinct but related concepts. Both are necessary before a defendant, either an individual or business entity, may be compelled to answer a claim brought in a court of law. Personal jurisdiction refers to whether the actions of an individual or business entity as set forth in the applicable statutes permit the court to exercise jurisdiction in a lawsuit brought against the individual or business entity in this state. See generally § 48.193; White v. Pepsico, Inc., 568 So.2d 886 (Fla.1990); Venetian Salami Co. v. Parthenais, 554 So.2d 499, 500 (Fla.1989) (stating that in order to subject a defendant to personal jurisdiction, "due process requires that the defendant have certain minimum contacts with the forum"). Service of process is the means of notifying a party of a legal claim and, when accomplished, enables the court to exercise jurisdiction over the defendant and proceed to judgment. See Shurman v. Atlantic Mortg. & Inv. Corp., 795 So.2d 952, 953 (Fla.2001) ("It is well settled that the fundamental purpose of service [of process] is `to give proper notice to the defendant in the case that he is answerable to the claim of plaintiff and, therefore, to vest jurisdiction in the court entertaining the controversy.'") (quoting State ex rel. Merritt v. Heffernan, 142 Fla. 496, 195 So. 145, 147 (Fla.1940))See, Florida Supreme Court Borden v. East-European Ins. Co., 921 So. 2d 587 - Fla: Supreme Court 2006.

11. **The law is well-established that "where an undisposed motion is pending in a cause, a default judgment may not be entered, unless the determination of the motion either way would not affect the plaintiff's right to proceed with the action."** Vacation Escape, Inc. v. Mich. Nat'l Bank, 735 So.2d 528, 529 (Fla. 4th DCA 1999) (quoting Punta Gorda Ready Mixed Concrete, Inc. v. Green Manor Constr. Co., 166 So.2d 889, 890 (Fla.1964)); see also Goodman v. Joffe, 57 So.3d 1001, 1001 (Fla. 4th DCA 2011) (reversing a default final

NOT A CERTIFIED COPY

judgment because "the trial court should have ruled on [the appellant's] pending motion to vacate the default entered against her before entering a default final judgment"); Lakeview Auto Sales v. Lott, 753 So.2d 723, 724 (Fla. 2d DCA 2000) **(reversing a default final judgment because the trial court failed to rule on pending motions to set aside the default).**

12. It is undisputed that the Motion to Vacate Default due to defective Service filed on behalf of Joshua and Jacob Bernstein as Indispensable parties was pending and undisposed at the time the Court improperly issued the Judgment which must now be Vacated. **Additionally, "[a]bsent strict compliance with the statutes governing service of process, the court lacks personal jurisdiction over the defendant." Anthony, 906 So. 2d at 1207 (quoting Sierra Holding v. Inn Keepers Supply, 464 So.2d 652 (Fla. 4th DCA 1985)).It is clear that Plaintiffs have not strictly complied with Service and Jurisdiction requirements and in fact have been grossly deficient and knowingly fraudulent. See, Walt Sahm and Patricia Sahm signed Letters and Emails. Exhibits. [T]he plaintiff failed to amend its complaint to allege the requisite allegations to support substitute service."); Moss v. Estate of Hudson by and through Hudson, 252 So.3d 785, 788 (Fla. 5th DCA 2018) ("When the complaint is devoid of the jurisdictional allegations required for substituted service, the defendant cannot be properly served under the substituted service statute.") (citations omitted); Taverna Opa Trademark Corp. v. Ismail, 2009 WL 1220513, at *1 (S.D. Fla. April 30, 2009) ("<u>Because the complaint lacks the necessary jurisdictional allegations, substitute service was not proper. Unfortunately, this deficiency cannot be cured by the subsequently filed affidavit, demonstrating the plaintiff's efforts to locate the defendant.</u>").** **See,** Onyx Enters. Int'l Corp. v. Sloan Int'l

NOT A CERTIFIED COPY

Holdings Corp., No. 20-60871-CIV-ALTMAN/Hunt (S.D. Fla. July 28, 2020) Southern District Fla. Even the Third Amended Complaint filed by Plaintiffs Walt and Patricial Sahm lacked proper jurisdictional allegations for substituted service and service and thus must be dismissed and the Judgment Vacated.

III. COUNSEL SWEETAPPLE ACKNOWLEDGES IMPROPER SERVICE ON BFR, LLC AND STATES TO THE COURT THE SERVICE WILL BE CORRECTED IN MARCH 2020 BUT FAILED TO DO SO OVER 500 DAYS LATER AT TIME OF SUMMARY JUDGMENT RENDERING MOTION DEFECTIVE; LACK OF GOOD CAUSE BY PLAINTIFF TO SERVE WITHIN 120 DAYS MANDATES DISMISSAL OF THE ACTION

PAGE 14 TRANSCRIPT OF PROCEEDINGS MARCH 5, 2020

And he did make the
16· ·one point that we are also addressing, Your Honor,
17· ·that's valid and that is that I did go back and look
18· ·at the situation with Mr. Tesher. The Bernstein
19· ·Family Realty was dissolved **and it shows a corporate**
20· ·registered agent so to the extent that Mr. Tesher may
21· ·not have had authority to accept, we are going to go
22· ·ahead and re-serve the registered agent of record and
23· ·then obviously move for default based on the fact
24· ·that they're not paying their fees and they're not
25· ·even in existence.

13. Section 48.062(1), Florida Statutes (2014), provides that process against an LLC may be served on the registered agent designated by the LLC. If service cannot be made on the LLC's registered agent, process may be served on a member, manager, or designated employee as set forth in section 48.062(2)(a)-(c). "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 of State as agent of the limited liability company as provided for in s. 48.181." § 48.062(3), Fla. Stat.; see also § 605.0117(3), Fla. Stat. (2014).

NOT A CERTIFIED COPY

14. It is undisputed that the Court knew that Plaintiff's counsel admitted that Service on BFR, LLC needed to be corrected and by Statute could have Served the Secretary of State but failed to do so at the time of both the Summary Judgment and Final Judgment which must now be Vacated as BFR LLC is an indispensable party.

15. Because Plaintiffs have grossly violated the Florida Rule on Service to be made within 120 Days of the filing of the Complaint or Amended Complaint and have failed to even file to show Good cause, the action must now be Dismissed with prejudice. In fact, Plaintiffs are over 750 days beyond the Florida Statute with No filings attempting to show Good faith. The Judgment must be vacated and the action Dismissed with prejudice.

WHEREFORE, Defendants, JOSHUA ENNIO ZANDER BERNSTEIN, JACOB NOAH ARCHIE BERNSTEIN, and DANIEL ELIJSHA ABE OTTOMO BERNSTEIN, requests this Court to:

A. Vacate the Final Judgment Entered on December 21, 2021
B. Order a Hearing on Attorney Fees
C. Sanction Counsel for the Plaintiffs for intentional misconduct by misleading this Court that Counsel for the Defendants had been copies and consented to the Final Judgment
D. Award Attorney Fees for Defendants Counsel for having to bring forth this Motion
E. All Other remedies necessary and just under statute

NOT A CERTIFIED COPY

CERTIFICATE OF SERVICE

WE DO CERTIFY, that a copy of the foregoing has been furnished electronically with the Clerk of Courts by using the EPORTAL system to all parties of record in the pending case to include: ROBERT SWEETAPPLE, ESQ. bsweetapple@sweetapplelaw.com

2-17-22
Dated

/s/Leslie Ferderigos
Leslie Ferderigos, Esq.
Leslie Ann Law, PA
Bar No.:0127526

941 N. Orange Ave
Winter Park, Fl 32789
(t) 407-969-6116
leslie@leslieannlaw.com

NOT A CERTIFIED COPY

NOT A CERTIFIED COPY