Case No. 3D21-1295

IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT, STATE OF FLORIDA

BASSEM ESSAM EL MALLAKH,

Appellant,

vs.

BELGIUM INVESTMENTS 960 BAY DR,

Appellee.

ON APPEAL OF THE ORDER DENYING APPELLANT'S MOTION TO VACATE FINAL JUDGMENT AND QUASH SERVICE OF PROCESS FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT[1]

This appeal involves service of process left on the doorsteps of the wrong home,[2] which was also unoccupied at the time of service, and the subsequent entry of a fundamentally erroneous final judgment award. BI attempts to muddy the waters by making arguments not at all germane to the issues on appeal. But BI cannot escape review of the errors it foisted upon the trial court below by canvassing its answer brief with jurisdictional attacks and derogatory, unproven allegations.[3]

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[1] This appeal is analogous to *Young v. Moxey*, No. 3D21-300 (Fla. 3d DCA Dec. 15, 2021) in which this Court recently found that a default final judgment was "void on due process grounds" and the damages award could not be ascertained with exactness.

[2] Appellee has represented to a California court that "[t]he [116 Rockefeller] Property ***is not*** the primary residence of the Judgment Debtor [El Mallakh] or of his spouse, and, therefore, is not a Homestead as defined under Cal CCP Section 704.710(c)." Appellant requests this Court to take judicial notice of Appellee's "Application for Order Authorizing the Sale of Real Property" filed in the California case and submitted to this Court in Appellant's Appendix to Emergency Motion to Stay, dated September 15, 2021.

[3] Appellant points out the perjurious averment in Appellee's Affidavit which states, the "process server communicat[ed] with the Defendant, Bassem Essam El Mallakh." (App. 42). Appellee has produced no evidence of any dialogue ever occurring between any process server and Appellant.

The trial court's decision eviscerates all citizens constitutional right to due process of law before being deprived of life, liberty, and property. It frustrates those citizens who rely on the requirement that plaintiffs strictly comply with the statutory provisions governing service of process, only to see their constitutional rights snatched away. It rewards those, like BI, who unjustly benefit by surreptitiously delivering process to an address known to not be the defendant's usual place of abode and while no one is present inside. And it stifles vacatur rules by depriving movants of the right and ability to contest the propriety of service of process and fundamentally erroneous final judgment awards. If left uncorrected, the decision below will reward BI for failing to properly serve any statutorily authorized person with process while depriving El Mallakh of his constitutional rights. In the long term, the costs will fall on society as a whole in the form of an erosion in service of process laws since plaintiffs are incentivized to have process left anywhere slightly remote to the defendant in the hopes of the defendant hearing through the grapevine of the lawsuit and later being forced to appear in the suit to vacate a default and judgment. Thus, as further

detailed below, the Court must reverse the trial court's order and remand for further proceedings consistent herewith.

ISSUE I — THE RETURN OF PROCESS IS SO FACIALLY DEFECTIVE IT RENDERS FINAL JUDGMENT VOID

A. This Issue is Properly Before this Court.

BI essentially contends that this Court lacks jurisdiction over this case. BI is wrong, however, as this issue is properly before this Court. "[T]he lack of jurisdiction [of the trial court] can be challenged at any time and may be considered independently by the appellate court, even if the issue was never raised in the trial court." *Stone v. Stone*, 873 So. 2d 628, 630 n.1 (Fla. 2d DCA 2004); *Seymour v. Panchita Inv., Inc.*, 28 So. 3d 194, 196 (Fla. 3d DCA 2010) ("no waiver argument can succeed" where defendant "filed no pleading or paper in the case until it moved to vacate the final judgment after default").

Here, BI devotes nearly 20 pages of argument attempting to divest this Court of jurisdiction. But none of the cases cited by BI are analogous to this case and support BI's contentions. Below, El Mallakh moved to vacate the default final judgment challenging its validity based on improper service and due process. And, at the March 24, 2021 evidentiary hearing, the issue the trial court

confronted was whether or not BI properly effectuated service of process and afforded El Mallakh due process. (App. 1368–1473). BI acknowledged El Mallakh's claim that the trial court lacked jurisdiction over him due to deficient service of process. (App. 737). As such, El Mallakh properly preserved this issue and this Court has jurisdiction over this appeal.

B. The Return Of Service & Affidavit Of Service Fail As A Matter Of Law.

"When there is an error or omission in the return of service, personal jurisdiction is suspended and it lies dormant until proper proof of valid service is submitted." *Vives v. Wells Fargo Bank, N.A.*, 128 So. 3d 9, 15-16 (Fla. 3d DCA 2012). Here, process server Investigator Johnson's return of service and affidavit of service clearly shows the facial defectiveness of service of process. (App. 28, 1078–79).[4] The affidavit noted that Sister Hanna clearly and unequivocally

[4] Juxtaposing the summons, (App. 30), return of service, (App. 28), and the declaration, (App. 1078), reveals defectiveness and credibility issues. That is, on March 3, 2019, BI directed Investigator Johnson to substitute serve "Reem Hanna" but, when attempting to make service on March 19, 2019, Investigator Johnson had no knowledge of a "Reem." (App. 30, 28, 1078). And BI misrepresented that "Reem" was "the girlfriend of Mr. El Mallakh" despite knowing she was his sister. (App. 1079). Investigator Johnson never testified below to resolve these discrepancies which is fatal to BI.

advised not once but twice that El Mallakh did not live there and that she would not accept service on behalf of him. *Id.* Nowhere is it alleged that the process server had personal knowledge that Sister Hanna was lying and that El Mallakh really lived there. And the affidavit clearly noted that Sister Hanna "refused to accept service over the intercom" as she was not presently home at the time the process server attempted service. *Id.* As such, the declaration was ambiguous as to whether the process server had any actual knowledge El Mallakh lived there at that time and which cannot constitute competent evidence of substitute service. And, because the party invoking the court's jurisdiction always has the burden of proving jurisdiction, there is no basis in law or logic to shift the burden to the defendant where the process server clearly does not know whether one of the required facts is present. Thus, because the declaration and return of service affirmatively show that there was doubt as to service, it was not regular on its face and was insufficient to create any presumption.

ISSUE II — BI'S ATTEMPTED SUBSTITUTED SERVICE FAILS FOR LACK OF DILIGENCE BEFORE RESORTING TO SUBSTITUTED SERVICE

A. BI's Diligence (Or Lack Thereof) Is Also Properly Before This Court.

BI contends that this Court lacks jurisdiction to consider the aspects of the trial court's ruling addressing BI's lack of diligence in attempting service. BI is wrong, however, as this Court has jurisdiction to consider interlocutory review of the denial of a motion to quash service and vacate judgment. *See, e.g.*, *Metro. Dade Cty. v. Green*, 596 So. 2d 458, 459 (Fla. 1992) ("The appellate court has complete discretion to devote whatever resources are necessary to resolve the issues at hand once it obtains jurisdiction of the cause."). Moreover, the issue of diligence is interwoven throughout the issues relating to the improper service here such that the trial court necessarily decided it anew at every stage of the proceeding at which service was addressed. First, in connection with the motion for judicial default, then in connection with the motion for final judgment, and then again in determining whether to vacate the final judgment. As such, BI cannot insulate this issue from appellate review.

B. There Is Nothing In The Record That Establishes BI's Diligence To Permit Substituted Service.

Due diligence is required to "overcome the primary requirement of personal service." *Wiggam v. Bamford*, 562 So. 2d 389, 391 (Fla. 4th DCA 1990). A plaintiff fails to exercise due diligence where the plaintiff fails to follow an obvious lead. *Id.*; *Hanna v. Millbyer*, 570 So. 2d 1087, 1087 (Fla. 3d DCA 1990); *Torelli v. Travelers Indem. Co.*, 495 So. 2d 837, 838 (Fla. 3d DCA 1986).

Here, BI failed to establish due diligence by not attempting to contact El Mallakh's known contact information and by not attempting to locate El Mallakh at the Broadway Address. (App. 148, 175, 1448–50). It is undisputed that BI made no attempt to contact El Mallakh by telephone despite knowing his number. *See Levenson v. McCarty*, 877 So. 2d 818, 820 (Fla. 4th DCA 2004) (holding service improper and due diligence lacking where plaintiff made no attempt to contact defendant by telephone). And BI was not able to serve El Mallakh at the Rockefeller Address because El Mallakh did not live there. (App. 722, 726, 840, 841, 867). Indeed, BI's own process

servers supported this conclusion. (App. 1448–50, 1218, 1219).[5] BI cannot point to anything in the record reflecting a process server's observation of El Mallakh at the Rockefeller Address. That is because El Mallakh did not live at that address.

Moreover, the record does not reflect any factual basis for finding that El Mallakh evaded service or concealed his whereabouts. BI's service attempts were focused on the Rockefeller Address — the address at which BI's own process server advised BI that El Mallakh did not reside, (App. 25), and at which months of surveillance resulted in no actual sightings of El Mallakh. BI cites to nothing in the record that excuses or explains the total absence of seeing El Mallakh at the Rockefeller Address. And everything BI cites to support proper service occurred after-the-fact and many months after the purported date El Mallakh was allegedly served process. BI's failure to serve El Mallakh at an address known to be wrong does not equate to El Mallakh's evasion. *See Bird v. Int'l Graphics*, 362 So. 2d 316, 317 (Fla. 3d DCA 1978) ("The failure of the sheriff and a

[5] BI's process server confirmed El Mallakh lived at the Broadway Address after inquiring with the Broadway Address leasing agent who stated that "yes [El Mallakh] live[s] in that [Broadway Address] apartment." (App. 1219).

process service to locate the defendant at three addresses furnished by the plaintiff is not enough to establish concealment. The record does not show by affidavit or otherwise that sufficient search and inquiry was actually made to ascertain that the defendant was concealing his whereabouts."). As such, there can be no dispute that BI failed to perform due diligence to locate El Mallakh's usual place of abode — which such due diligence and a "standard database search" for him would have uncovered the Broadway Address. (App. 1448–50).

ISSUE III — THE DEFAULT FINAL JUDGMENT AWARD OF $4,255,000.00 IS SPECULATIVE, NOT SUPPORTED BY THE EVIDENCE, A SURPLUS RECOVERY FOR BI, WAS UNAUTHORIZED BY LAW, AND AMOUNTED TO FUNDAMENTAL ERROR

A. The Final Judgment Is Fundamentally Erroneous.

The Final Judgment is also void because it awarded unliquidated damages without having jurisdiction over El Mallakh and without affording El Mallakh the opportunity to be heard and present evidence. And, because the error appears on the face of the Final Judgment and record, no transcript of the proceedings below is necessary for appellate review.

"The failure to provide a defendant with notice and an opportunity to be heard where the damages are unliquidated is a due process violation and constitutes fundamental error requiring that such damages be set aside." *Lincoln Mews Condo. Association, Inc. v. Harris*, 276 So. 3d 344, 348 (Fla. 3d DCA 2019). When the claim at issue involves unliquidated damages, there is a "due process entitlement to notice and an opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of those damages." *Tand v. C.F.S. Bakeries, Inc.*, 559 So. 2d 670, 671 (Fla. 3d DCA 1990) (reversing trial court and setting aside final default judgment since defendant "did not receive notice of a hearing or trial to determine actual damages"). "Liquidated damages" are defined as damages that can be determined by "an arithmetical calculation or by application of definite rules of law." *Id.*; *see also Sarasota Estate & Jewelry Buyers, Inc. v. Joseph Gad, Inc.*, 25 So. 3d 619, 621 (Fla. 2d DCA 2009) ("Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law."). Damages are

not liquidated if testimony is required to determine how to evaluate the damages. *Bowman v. Kingsland Dev.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983).

Here, is it undisputed that the alleged damages in this case were unliquidated. That is, there is no pleaded agreement between BI and El Mallakh, arithmetical calculation, applicable rule of law, or any other method to determine the alleged $4,255,000.00 damages with exactness. *Young*, No. 3D21-300 at *3 (collecting cases). BI, therefore, was required to provide El Mallakh with proper notice and an opportunity to be heard. *Id.* And BI indisputably failed to provide El Mallakh with proper notice, (App. 699–700), thereby depriving El Mallakh of his basic due process rights.

BI contends that the absence of a transcript of the 15 minute specially set hearing in the record bars appellate review. BI is wrong, however, as the error appears on the face of the Final Judgment and record. *See Klinka v. Klinka*, 959 So. 2d 383, 385 (Fla. 5th DCA 2007) ("when, as here, the deficiencies are obvious on the face of the final judgment, record or order, the existence of a transcript of proceedings is irrelevant to the resolution of such claims and appellate review is not precluded."); *Boone v. Boone*, 3 So. 3d 403, 404 (Fla. 2d DCA

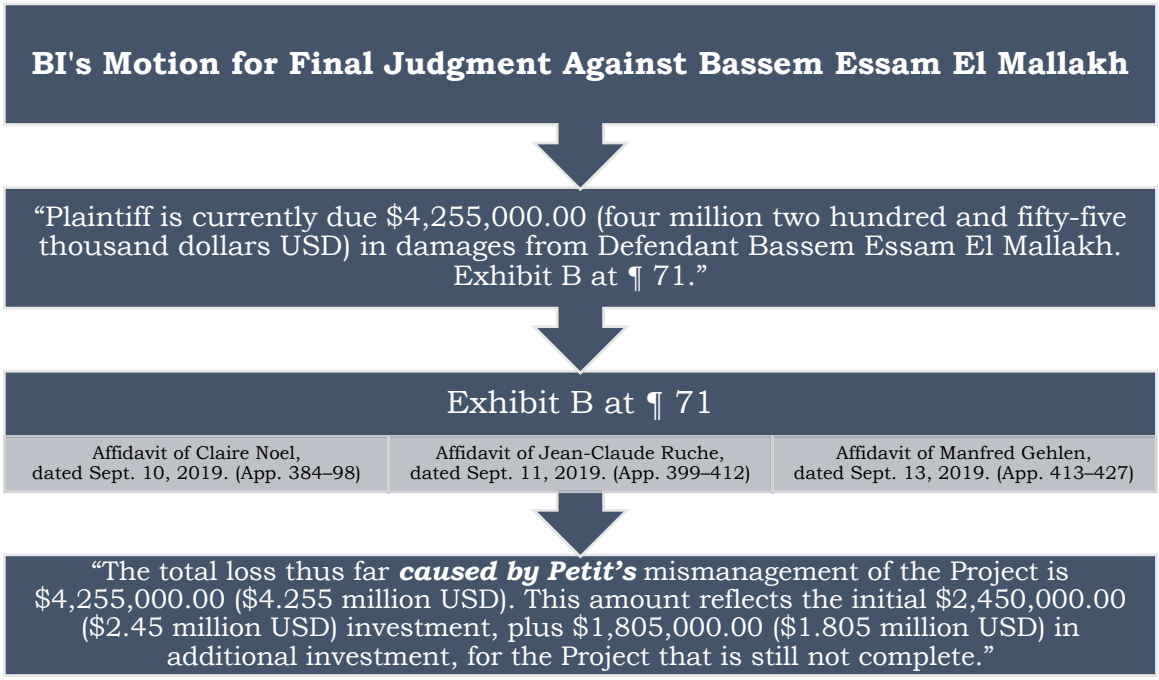
2009) (reversing since "error is apparent on the face of the trial court's order"). More specifically, BI filed a motion for final judgment against El Mallakh, (App. 375–81), attaching the following exhibits as support:

Exhibit A: Order Entering Judicial Default Against Appellant. (App. 382).

Exhibit B: three affidavits and 260 pages of various unsworn documentary matter. (App. 384–427, 428–691).

Exhibit C: BI's proposed Final Judgment Against Bassem Essam El Mallakh. (App. 692).

In that motion, BI claimed to be "currently due $4,255,000.00 (four million two hundred and fifty-five thousand dollars USD) in damages from Defendant Bassem Essam El Mallakh" and cited to "Exhibit B at ¶ 71" as support. (App. 380, ¶ 7). "Exhibit B at ¶ 71" vitiates the veracity of BI's assertion:



"Exhibit B" only contained three affidavits and 260 pages of unsworn documentary matter. Those three affidavits clearly show that El Mallakh did not cause or contribute to BI's alleged damages of $4,255,000.00. Stated differently, the affidavits completely exonerate El Mallakh of the alleged $4,255,000.00 damages BI allegedly incurred.[6] And the 260 pages of unsworn documentary matter — which consisted of emails, company formation agreements, and various assorted lists — do not support the Final Judgment award. It begs the question as to what alternative evidence BI could

[6] BI entered into a settlement agreement with the other defendants, (App. 708, 712), thereby creating an issue regarding setoff.

have produced at the 15-minute special set hearing that it did not already produce. Furthermore, contrary to BI's assertion that Mr. El Mallakh had "due process" and "repeated notice," BI failed to provide any notice of the February 21, 2020 specially set hearing to El Mallakh. (App. 699–700). Thus, because the Final Judgment and record demonstrate clear error, the fact that there is no transcript of the proceedings below does not preclude appellate review. *See Klinka*, 959 So. 2d at 385; *Boone*, 3 So. 3d at 404.

CONCLUSION

For the foregoing reasons, Appellant Bassem Essam El Mallakh respectfully requests the Court to reverse the trial court's order, quash service of process, vacate the final judgment, and remand with directions to vacate the Final Judgment as it is void as a matter of law and in accordance herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished and served via the Florida E-Portal on January 10, 2022 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief has been prepared with 14-point Bookman Old Style font and complies with the word count requirement in accordance with the Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

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