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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11240

D.C. Docket No. 1:14-cv-00322-WS-C

ALEIDA JOHNSON,
f.k.a. Aleida Hill,
individually and on behalf of all similarly situated individuals,

Plaintiff-Appellant,

versus

MIDLAND FUNDING, LLC,

Defendant-Appellee.

No. 15-14116

D.C. Docket No. 1:14-cv-00324-WS-M

JUDY N. BROCK,
individually and on behalf of a class of others similarly situated,
DONALD CUNNINGHAM,

Plaintiffs-Appellants,

versus

RESURGENT CAPITAL SERVICES, L.P.,
LVNV FUNDING, LLC,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Alabama

(May 24, 2016)

Before WILSON, MARTIN and HIGGINBOTHAM,* Circuit Judges.

MARTIN, Circuit Judge:

Under the Bankruptcy Code ("Code"), a "creditor . . . may file a proof of claim" in a bankruptcy proceeding. 11 U.S.C. § 501(a). The Fair Debt Collection Practices Act ("FDCPA") prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This Court held that a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred. Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1261 (11th Cir. 2014). In considering this case below, the District Court interpreted the Crawford ruling as having placed the FDCPA and the Code in irreconcilable

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*Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

conflict. We see no such conflict. Although the Code certainly allows all creditors to file proofs of claim in bankruptcy cases, the Code does not at the same time protect those creditors from all liability. A particular subset of creditors—debt collectors—may be liable under the FDCPA for bankruptcy filings they know to be time-barred. Because we find no irreconcilable conflict between the FDCPA and the Code, we reverse.

I.

Aleida Johnson filed a Chapter 13 bankruptcy petition in March 2014. In May 2014, Midland Funding, LLC ("Midland") filed a proof of claim in her case, seeking payment of $1,879.71. Midland is a buyer of unpaid debt. Specifically, Midland purchases accounts with overdue unpaid balances and tries to collect those accounts. Midland's claim against Ms. Johnson originated with Fingerhut Credit Advantage, and the date of the last transaction on her account was listed as May 2003. This was over ten years before Ms. Johnson filed for bankruptcy. The claim arose in Alabama, where the statute of limitations for a creditor to collect an overdue debt is six years. See Ala. Code § 6-2-34.

Judy Brock also filed a Chapter 13 bankruptcy petition. Ms. Brock filed her petition in April 2014; in June 2014, Resurgent Capital Services, L.P. ("Resurgent") filed a proof of claim seeking payment of $4,155.40. Resurgent is a "manager and servicer of domestic and international consumer debt portfolios for credit grantors and debt buyers." Resurgent's filing was an attempt to collect Ms. Brock's debt on behalf of LVNV Funding, LLC, which is a purchaser of unpaid debt like Midland. Ms. Brock's debt originated with Washington Mutual Bank, N.A., and the date of the last transaction on her account was January 2008. There had been no activity on her account for over six years before Ms. Brock filed for bankruptcy.

Ms. Johnson and Ms. Brock (together, "Debtors") sued their respective creditors (together, "Claimants") under the FDCPA. The FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes attempting to collect a debt that is not "expressly authorized by the agreement creating the debt or permitted by law." Id. § 1692f(1). Both Debtors alleged in their lawsuits that the claims on their face were barred by the relevant statute of limitations. They argued that the proofs of claim were thus "'unfair,' 'unconscionable,' 'deceptive,' and misleading" in violation of the FDCPA.

Midland moved to dismiss Ms. Johnson's FDCPA suit, and the District Court granted the motion. The District Court read the Bankruptcy Code as affirmatively authorizing a creditor to file a proof of claim—including one that is time-barred—if that creditor has a "right to payment" that has not been extinguished under applicable state law. The District Court identified tension between this provision of the Code and the FDCPA, which makes it unlawful to file a proof of claim known to be time-barred. The court found this conflict to be irreconcilable and applied the doctrine of implied repeal to hold that a creditor's right to file a time-barred claim under the Code precluded debtors from challenging that practice as a violation of the FDCPA in the Chapter 13 bankruptcy context.

In Ms. Brock's later FDCPA suit, the District Court granted Resurgent's motion for judgment on the pleadings based on the rationale and holding in Ms. Johnson's case. The two cases were consolidated for this appeal.

II.

We review de novo the District Court's grant of a motion to dismiss for failure to state a claim. Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1275 (11th Cir. 2013). Like the District Court, we accept the allegations in the complaint as true and construe the facts in the light most favorable to the plaintiff. Id. We apply the same standard of review to the District Court's judgment on the pleadings. See Horsley v. Feldt, 304 F.3d 1125, 1131 (11th Cir. 2002). Judgment on the pleadings is appropriate "when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." Ortega v. Christian, 85 F.3d 1521, 1524 (11th Cir. 1996).

III.

The Debtors argue on appeal that the District Court's decision conflicts with our Circuit's precedent in Crawford. Again, Crawford held that a debt collector violates the FDCPA by knowingly filing a proof of claim in a bankruptcy proceeding on a debt that is time-barred. 758 F.3d at 1261. The Debtors here pursue their argument that the Code does not preclude this type of FDCPA claim simply because the claim was made in the context of a Chapter 13 bankruptcy case.

A.

In Crawford, this Court faced a question nearly identical to the one we consider here: "whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates the [FDCPA]." 758 F.3d at 1256. We concluded there was an FDCPA violation in Crawford, based on "[t]he FDCPA's broad language, our precedent, and the record." Id. at 1257.

The Crawford panel first looked to the language of the FDCPA, which prohibits a "false, deceptive, or misleading representation," 15 U.S.C. § 1692e, or "unfair or unconscionable means," id. § 1692f, to collect on a debt. 758 F.3d at 1258. Because of the ambiguity in these terms, the Court adopted a "'least-sophisticated consumer' standard" to evaluate whether a debt collector's conduct was deceptive under the FDCPA. Id. It then concluded that "[s]imilar to the filing of a stale lawsuit," which is prohibited by the FDCPA for debts on which the statute of limitations has run, "a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt." Id. at 1261. This impression causes problems because "[t]he 'least sophisticated' Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and thus fail to object to such a claim." Id. Then when the debtor fails to object, the time-barred debt becomes part of the debtor's repayment plan, which would "necessarily reduce[] the payments to other legitimate creditors with enforceable claims." Id. Thus Crawford held that the practice of filing time-barred proofs of claim was misleading under the FDCPA. Id.

In a footnote, the panel said it "decline[d] to weigh in on a topic the district court artfully dodged: Whether the Code 'preempts' the FDCPA when creditors misbehave in bankruptcy." Id. at 1262 n.7. The Court said it "need not address this issue" because the claimant there "argue[d] only that its conduct does not fall under the FDCPA, or, alternatively, did not offend the FDCPA's prohibitions" and it "d[id] not contend that the Bankruptcy Code displaces or 'preempts' §§ 16923 and 1692f of the FDCPA." Id.

B.

We now answer the question left open in Crawford. The Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred. We recognize that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations. However, when a particular type of creditor—a designated "debt collector" under the FDCPA—files a knowingly time-barred proof of claim in a debtor's Chapter 13 bankruptcy, that debt collector will be vulnerable to a claim under the FDCPA. Our examination of these statutes leads us to conclude that the Code and the FDCPA can be read together in a coherent way.

1.

Under the Bankruptcy Code, a "creditor . . . may file a proof of claim" in a debtor's bankruptcy. 11 U.S.C. § 501(a). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Id. § 101(5)(A). The Supreme Court interprets this language to create an "entitle[ment]" for creditors to file a proof of claim in a bankruptcy proceeding where a "right to payment" exists. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 449, 127 S. Ct. 1199, 1204 (2007) (quotation omitted). A "right to payment" under the Bankruptcy Code "is nothing more nor less than an enforceable obligation." Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 559, 110 S. Ct. 2126, 2131 (1990).

The Debtors argue that there is no "right" to file a time-barred claim when there is no right to have that claim repaid in a Chapter 13 bankruptcy proceeding. We reject this argument, because the Code does allow claims in a Chapter 13 bankruptcy proceeding by a party who does not necessarily have a right to have his claim paid. See In re McLean, 794 F.3d 1313, 1321 (11th Cir. 2015) ("[T]he Bankruptcy Code explicitly contemplates that creditors may file unenforceable claims in the bankruptcy court."). And having a claim is not the same as being entitled to a remedy. Indeed, Alabama law, which governs the right of the Claimants to recover here, provides that "[w]hen the statute of limitations expires, it does not extinguish the cause of action; instead, it makes the remedy unavailable." In re HealthSouth Corp., 974 So. 2d 288, 296 (Ala. 2007). So although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place. See id.

As the District Court pointed out, the Bankruptcy Code's procedure for addressing proofs of claim demonstrates that some filed claims will not ultimately be paid in a bankruptcy proceeding. Where a proof of claim is filed in a bankruptcy case, that claim is generally "deemed allowed," so it will be viewed as a valid claim and paid out of the bankruptcy estate. 11 U.S.C. § 502(a). However, the bankruptcy trustee is charged with "examin[ing] proofs of claim and object[ing] to the allowance of any claim that is improper." Id. § 704(a)(5); see also id. at § 1302(b)(1). Once the trustee objects, the bankruptcy court is in turn charged with determining whether the claim "is unenforceable against the debtor . . . under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." Id. § 502(b)(1); see also id. § 558 ("The [bankruptcy] estate shall have the benefit of any defense available to the debtor . . . including statutes of limitation."). Thus, where the bankruptcy process is working as intended, a time-barred proof of claim may be filed but will not be paid by the bankruptcy estate.

2.

So while we recognize that creditors can file proofs of claim they know to be barred by the relevant statute of limitations, those creditors are not free from all consequences of filing these claims. The FDCPA does not allow a debt collector to "use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Neither may they "use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Id. § 1692e. A debt collector who violates one of these rules may face civil liability to the debtor. Id. § 1692k. As this Court recognized in Crawford, a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding. 758 F.3d at 1261.

Of course, the FDCPA does not reach all creditors. The statute applies only to "debt collectors," who are defined as "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). And "debt collectors" are a narrow subset of the universe of creditors who might file proofs of claim in a Chapter 13 bankruptcy. Under the Code, any "creditor" (defined as any "entity that has a claim against the debtor that arose at the time of or before the [bankruptcy] order") may file a proof of claim. 11 U.S.C. § 101(10)(A). So not all "creditors" who file a proof of claim in a Chapter 13 bankruptcy case can face potential FDCPA liability as "debt collectors."

Also, the FDCPA provides a safe harbor for debt collectors who might unintentionally or in good faith file such a claim. See 15 U.S.C. § 1692k(c). A debt collector who appears to have violated the FDCPA can avoid liability by showing (by a preponderance of evidence) that their violation "was not intentional and resulted from a bona fide error." Id. These two requirements—that the claim be filed by a "debt collector" and that the claim be "knowingly" time-barred—limit application of the FDCPA to a narrow range of actors and claims.

3.

The District Court found an "obvious tension" between the Bankruptcy Code and the FDCPA because "the Code permits creditors to file proofs of claim in Chapter 13 proceedings on debts known to be time-barred, while the Act prohibits debt collectors from engaging in such conduct." Based on its perception that this is an "irreconcilable conflict," the District Court found that the later-enacted Code impliedly repealed the earlier-enacted FDCPA. In that court's view, this prohibited the Debtors from seeking FDCPA remedies against the Claimants who had filed proofs of claim in their Chapter 13 bankruptcy cases.

Where two federal statutes conflict, a cause of action provided by one statute may be precluded by the provisions of the other. See POM Wonderful LLC v. Coca-Cola Co., ___ U.S. ___, ___, 134 S. Ct. 2228, 2236 (2014). Where there is such an "irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503, 56 S. Ct. 349, 352 (1936) (quotation omitted). However, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662, 127 S. Ct. 2518, 2532 (2007) (quotations omitted) (alteration adopted).

This is to say that courts must be modest in construing a repeal by implication. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S.

124, 143–44, 122 S. Ct. 593, 605 (2001) (quotation omitted). For irreconcilable conflict to exist there must usually be some sort of "positive repugnancy" between the statutes at issue, because two statutes can typically coexist if they simply contain "different requirements and protections." Id. We will not infer a statutory repeal unless either the later statute expressly contradicts the earlier statute or this construction "is absolutely necessary" in order for the later statute to "have any meaning at all." Nat'l Ass'n of Home Builders, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The FDCPA and the Code are not in irreconcilable conflict. The FDCPA and the Code differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist. See POM Wonderful LLC, 134 S. Ct. at 2238 (finding two federal statutes complementary to each other when they touched on the same general subject matter but each "ha[d] its own scope and purpose" and "impose[d] different requirements and protections" (quotation omitted)). There is no "positive repugnancy" between the statutes, because reading the two statutes as we described does not create such an express contradiction that implied repeal of the FDCPA "is absolutely necessary" in order for § 501(a) of the Bankruptcy Code (which creates the right to file a claim) to "have any meaning at all." Nat'l Ass'n of Home Builders, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The Bankrupty Code and the FDCPA can be reconciled because they provide different protections and reach different actors. See J.E.M. Ag Supply, Inc., 534 U.S. at 142, 122 S. Ct. at 604 (finding no irreconcilable conflict where two regimes regulate at different levels of stringency and provide varying amounts of protection). The Code allows all "creditors" to file proofs of claim, see 11 U.S.C. § 101(10)(A), while the FDCPA dictates the behavior of only "debt collectors" both within and outside of bankruptcy, see 15 U.S.C. § 1692a(6). The Code establishes the ability to file a proof of claim, see 11 U.S.C. § 105(a), while the FDCPA addresses the later ramifications of filing a claim, see Crawford, 758 F.3d at 1257.

We read these regimes together as providing different tiers of sanctions for creditor misbehavior in bankruptcy. Cf. POM Wonderful LLC, 134 S. Ct. at 2238 ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). In a Chapter 13 bankruptcy proceeding, the first potential line of protection against a creditor who files a time-barred proof of claim is for the bankruptcy trustee to object to the claim during the course of the bankruptcy proceedings. See 11 U.S.C. §§ 704(a)(5), 1302(b)(1). If the bankruptcy court finds the objection to be proper, it can deny payment of the claim. See id. § 502(b)(1). Where a creditor's misbehavior is more severe, the

Code provides a more powerful remedy. Bankruptcy courts have the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]," such as issuing sanctions against a party for misbehavior. Id. § 105(a).

The FDCPA easily lies over the top of the Code's regime, so as to provide an additional layer of protection against a particular kind of creditor. It kicks in only when the creditor is a debt collector that "regularly collects" or is in "any business the principal purpose of which is the collection" of debts. 15 U.S.C. § 1692a(6). And even then, the requirement for finding a violation is quite stringent—the creditor's behavior must reach the point of "unconsionab[ility]" or "decepti[on]." Id. §§ 1692e, 1692f. It is only under these circumstances that the FDCPA offers the severe remedy of civil liability for damages to the debtor. See id. § 1692k(a).

We thus conclude that the FDCPA and the Code can coexist. Our holding does not infringe any creditor's ability to file a claim in a debtor's bankruptcy proceeding. However, when a debt collector, as specifically defined by the FDCPA, files a proof of claim for a debt that the debt collector knows to be time-barred, that creditor must still face the consequences imposed by the FDCPA for a "misleading" or "unfair" claim. The Bankruptcy Code's rules about who can file claims do not shield debt collectors from the obligations that Congress imposed on them.

We reject the Claimants' assertion that potential consequences under the FDCPA for filing a time-barred proof of claim effectively forces a debt collector to "surrender[] its right to file a proof of claim." This argument misunderstands the relationship between the two statutes. There is no blanket prohibition on filing a time-barred claim in bankruptcy, and we say nothing to the contrary here.[1] In the same way, the Bankruptcy Code does not require any creditor to file a proof of claim in a bankruptcy proceeding—it only allows it. See 11 U.S.C. § 501(a). If a debt collector chooses to file a time-barred claim, he is simply opening himself up to a potential lawsuit for an FDCPA violation. This result is comparable to a party choosing to file a frivolous lawsuit. There is nothing to stop the filing, but afterwards the filer may face sanctions. See Fed. R. Civ. P. 11(b)–(c).

In closing, we observe that our conclusion that there is no "positive repugnancy" between the FDCPA and the Bankruptcy Code is bolstered by two additional facts. First, no provision in either the FDCPA or the Code "purports to govern the relevant interaction between the [two statutes]." POM Wonderful LLC, 134 S. Ct. at 2237. Second, Congress never expresed a "clear and manifest intent"

[1] Such an outcome would be inappropriate, because the FDCPA recognizes and provides a safe harbor for creditors who may file proofs of claim that are time-barred, if those filings arose from a good-faith belief resulting from a recording error that the statute of limitations had not in fact run on the claim. See 15 U.S.C. § 1692k(c).

to repeal the protections of the FDCPA when it enacted the Bankruptcy Code only one year later. See Nat'l Ass'n of Home Builders, 551 U.S. at 662, 127 S. Ct. at 2532. Because the FDCPA and the Bankruptcy Code may be read to coexist, the Code does not preclude an FDCPA claim in the bankruptcy context.

IV.

This dispute reveals no irreconcilable conflict between the Bankruptcy Code and the FDCPA. A creditor may file a proof of claim in a Chapter 13 bankruptcy proceeding under the Code. However, when that creditor is also a "debt collector" as defined by the FDCPA, the creditor may be liable under the FDCPA for "misleading" or "unfair" practices when it files a proof of claim on a debt that it knows to be time-barred, and in doing so "creates the misleading impression to the debtor that the debt collector can legally enforce the debt." Crawford, 758 F.3d at 1261. Because the Debtors' FDCPA claims are not precluded by the Bankruptcy Code, we reverse and remand to the District Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Supreme Court of Florida

No. SC14-2404

FLORIDA DEPARTMENT OF REVENUE,
Appellant,

vs.

AMERICAN BUSINESS USA CORP.,
Appellee.

[May 26, 2016]

LABARGA, C.J.

This case is before the Court for review of the decision of the Fourth District Court of Appeal in American Business USA Corp. v. Department of Revenue, 151 So. 3d 67 (Fla. 4th DCA 2014). Because the district court expressly declared invalid a state statute, section 212.05(1)(*l*), Florida Statutes (2012), this Court has jurisdiction to review the decision. See art. V, § 3(b)(1), Fla. Const. For the reasons we explain, we quash the decision of the Fourth District and hold section 212.05(1)(*l*) constitutional.

FACTS AND PROCEDURAL HISTORY

This case commenced when the Florida Department of Revenue ("the Department") issued a proposed tax assessment on American Business USA Corp. ("American Business"), doing business as 1Vende.com in Wellington, Florida, for taxes and interest on the company's internet sales transactions between April 1, 2008, and March 31, 2011. American Business is a for-profit business incorporated in Florida and having its physical location and principal address in Florida. All the company's sales of flowers, gift baskets, and other items of tangible personal property were initiated online. The company did not maintain any inventory of these items but would use florists that were local to the location of the delivery to fill the order. The company charged its customers tax on flowers and other items delivered in Florida by local florists, but did not charge its customers sales tax on flowers and other items delivered outside of Florida.

The tax assessment was issued by the Department to American Business pursuant to section 212.05(1)(*l*), Florida Statutes (2012), which provides in pertinent part:

> Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items are to be delivered. Florists located in this state are not liable for sales tax on payments received from other florists for items delivered to customers in this state.

Under Florida Administrative Code Rule 12A-1.047(1), "[f]lorists are engaged in the business of selling tangible personal property at retail and their sales of flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable." The statute and rule were relied on by the Department in this case.

After American Business filed a timely protest, a hearing was set before the Division of Administrative Hearings. The administrative law judge issued a pre-hearing order requiring the parties to stipulate to as many facts as possible. Accordingly, the parties filed a joint pre-hearing stipulation setting forth pertinent stipulated facts.[1] After the administrative hearing, at which the co-owners of the business testified and the Department offered exhibits, the administrative law judge issued an order recommending that the Department uphold the tax assessment. The Department subsequently entered a final order adopting the administrative law

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1. The parties stipulated as follows: American Business USA Corp. is a Florida corporation doing business as 1Vende.com; American Business's principal place of business and mailing address is in Wellington, Florida; all of American Business's sales were initiated online; American Business specialized in the sale of flowers, gift baskets, and other items of tangible personal property; American Business did not maintain any inventory of flowers, gift baskets, and other items of tangible personal property; American Business used local florists to fill the orders it received for flowers, gift baskets, and other items of tangible personal property; American Business charged its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered in Florida; American Business did not charge its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered outside of Florida.

judge's recommended order in full. The order concluded that the tax required by section 212.05 is a tax on the privilege of engaging in business in Florida and is not a tax on the property sold. The order also noted that American Business "stipulated that it specializes in selling flowers and markets itself to the public as a company that sells flowers," rejecting the claim of American Business that, because of the manner in which it fills the orders, it is not a "florist" within the meaning of and subject to section 212.05(1)(*l*) or rule 12A-1.047.

American Business appealed the Department's final order to the Fourth District Court of Appeal where the company contended that the imposition of taxes on American Business for sales of flowers and other items of tangible personal property to be delivered out of state violated the due process clause of the Fourteenth Amendment and the "dormant Commerce Clause" emanating from article 1, section 8, of the United States Constitution.[2]

As to the challenge to section 212.05(1)(*l*) imposing a tax on florists, the Fourth District held that the imposition of taxes on sales to out-of-state customers

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2. "[T]he Constitution's express grant to Congress of the power 'to regulate Commerce . . . among the several states,' Art. I, § 8, cl. 3, contains a 'further negative command, known as the dormant Commerce Clause,' . . . . This negative command prevents a State from 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.' " Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005) (citations omitted).

for out-of-state flower and gift deliveries violates the dormant Commerce Clause; and that the tax is thus "unconstitutional as applied to [American Business's] sales to out-of-state customers for out-of-state delivery." Am. Bus. USA, 151 So. 3d at 70. In so holding, the Fourth District recognized the factors necessary to evaluate whether a tax complies with the commerce clause:

> "The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities." MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008). When it comes to evaluating a tax regarding its compliance with the commerce clause, the decisions of the United States Supreme Court
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>> have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an [1] activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.
>
> Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). This has come to be known as the Complete Auto test. If the state tax fails any prong of the four-part test, then the tax violates the dormant commerce clause. Thus, if the taxing state is able to show only three of the four prongs under Complete Auto, the tax will not be sustained under a commerce clause challenge.

Am. Bus. USA, 151 So. 3d at 71. After applying the Complete Auto test to the facts of the case, and concluding the tax at issue here was an undue burden on interstate commerce, the district court stated, "Merely registering in a state does not give the taxing state the right to assess sales taxes on transactions without any other facts to constitute 'substantial nexus.' " Am. Bus. USA, 151 So. 3d at 73.

As to the Due Process Clause claim, the Fourth District, relying on the United States Supreme Court decision in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), noted that a tax on a vendor may violate the Commerce Clause but not the Due Process Clause

> because "the two, the Due Process clause and the Commerce Clause are analytically distinct." [Quill Corp., 504 U.S. at 305]. "[A] corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause."

Am. Bus. USA, 151 So. 3d at 74 (quoting Quill Corp., 504 U.S. at 313). In finding that due process was not violated in this case because minimum contacts were present, the Fourth District explained that "traditional notions of fair play and substantial justice were not offended because the taxpayer's company was registered in Florida and had a mailing address in Florida." Id. at 73. In distinguishing claims under the Commerce Clause from Due Process claims, the Fourth District noted that "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." Id. at 74 (quoting Quill Corp., 504 U.S. at 312).

In sum, the Fourth District concluded that American Business had minimum contacts with the State of Florida such that no due process violation occurred, but that the business activities lacked a "substantial nexus" to Florida to allow tax on sales involving out-of-state customers and out-of-state delivery of flowers, gift baskets, and tangible property that were never located in Florida. For the reasons discussed below, we disagree that the tax on American Business violates the dormant Commerce Clause.

ANALYSIS

The issue before this Court is whether section 212.05(1)(*l*), Florida Statutes, is unconstitutional as applied to certain activities of American Business. The constitutionality of a state statute is a pure question of law subject to de novo review. City of Miami v. McGrath, 824 So. 2d 143, 146 (Fla. 2002). This applies to a review of the constitutionality of a tax statute. See Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954, 957 (Fla. 2005) ("[T]he interpretation of . . . [a] tax statute . . . [is] subject to a de novo standard of review."). In this case, American Business brought a challenge to section 212.05(1)(*l*), which, because it is an as-applied challenge, involves both a determination of law and a determination of the facts to which the law will be applied. "[M]ixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue." Davis v. State, 142 So. 3d 867, 871 (Fla. 2014) (quoting Henry v. State, 134 So. 3d 938, 946 (Fla. 2014)).

However, where, as here, "the facts are not in dispute, the only issue before the court is a reconciliation of the statutory provisions on which the parties respectively rely . . . . [and the] standard of review is de novo." Boca Airport, Inc. v. Fla. Dept. of Revenue, 56 So. 3d 140, 141-42 (Fla. 4th DCA 2011). Because the issue in this case is whether the tax statute is unconstitutional as applied to American Business, and because the operative facts are stipulated by the parties, the review by this Court remains de novo.

As in all constitutional challenges, the statute comes to this Court clothed with the presumption of correctness and all reasonable doubts about the statute's validity are to be resolved in favor of constitutionality. "While we review decisions striking state statutes de novo, we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2010) (quoting Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005) (quoting Fla. Dep't of Revenue v. Howard, 916 So. 2d 640, 642 (Fla. 2005))). With these standards in mind, we turn to the statute at issue.

Section 212.05, Florida Statutes (2012), provides in pertinent part that "every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, . . ." The statute further provides that "[f]or the exercise of such privilege, a tax is levied on each taxable transaction or incident." § 212.05(1), Fla. Stat. (2012) (emphasis added). Thus, the administrative law judge and the Department are correct that the statute does not place a tax on the items sold, but on the sales transaction itself. Subsection (1)(*l*) then makes clear that "[f]lorists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items are to be delivered." § 212.05(1)(*l*), Fla. Stat. (2012) We turn first to the issue of whether section 212.05(1)(*l*) violates the dormant Commerce Clause as applied to American Business's internet sales of flowers, gift baskets, and other tangible personal property.

The Dormant Commerce Clause

The relevant inquiry into a claim of violation of the dormant Commerce Clause begins with the Complete Auto test. In Complete Auto, the United States Supreme Court addressed " 'the perennial problem of the validity of a state tax for the privilege of carrying on within a state, certain activities' related to a corporation's operation of an interstate business." 430 U.S. at 274 (quoting Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 101 (1975)). The Mississippi tax was to be levied on gross sales of any business within the state, and the law required that anyone liable for the tax is required to add it to the gross sales price and collect it at the time the sales price is collected. Id. at 276. The Supreme

Court upheld the tax, which was imposed on a motor carrier transporting vehicles manufactured outside the state and shipped into the state by a company that did business within the state. The basis for affirmance announced in Complete Auto is the four-prong test that has come to be applied to determine if a taxing statute violates the dormant Commerce Clause. The Supreme Court in Complete Auto upheld that tax because no claim or showing was "made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." Id. at 287.

The Supreme Court in Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. 175 (1995), later explained that the Court has "often applied, and somewhat refined, what has come to be known as Complete Auto's four-part test." Jefferson Lines, 514 U.S. at 183. As noted above, the Court explained the test as requiring in its first prong that "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." Id. at 184.

The second prong of the Complete Auto test, as interpreted in Jefferson Lines, looks at whether the tax is properly apportioned to ensure that each state taxes only its fair share of an interstate transaction. Jefferson Lines, 514 U.S. at 184. The Court explained that "[f]or over a decade now, we have assessed any threat of malapportionment by asking whether the tax is ‘internally consistent’ and, if so, whether it is ‘externally consistent’ as well." Id. at 185 (quoting Goldberg v, Sweet, 488 U.S. 252, 261 (1989)). The first component of prong two, internal consistency, "is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." Id. The Supreme Court in Jefferson Lines concluded that the tax at issue was internally consistent because "[i]f every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax." Id. The second component of prong two is external consistency, which looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." Id. "[T]he threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching." Id.

The third prong of the Complete Auto test, whether the tax discriminates against interstate commerce, looks at whether the tax provides a direct commercial advantage to local business. Jefferson Lines, 514 U.S. at 197. As the Supreme Court in Jefferson Lines noted, such a discriminatory advantage was found in American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 285-86 (1987), where the tax imposed a cost per mile on trucks operated by an interstate motor carrier that was five times as heavy as the cost per mile borne by local trucks. Jefferson Lines, 514 U.S. at 197 (citing Am. Trucking, 483 U.S. at 269).

Finally, the fourth prong of the Complete Auto test looks at whether the tax is fairly related to the services provided by the State. Id. The Supreme Court in Jefferson Lines explained that "the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State." Id. at 199. However, "[t]he fair relation prong of Complete Auto requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." Id. The Court further noted that "police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of the tax." 514 U.S. at 200 (citing Goldberg, 488 U.S. at 267). The test "asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State." Id. at 200.

The Department of Revenue in this case contends that only prong one of the Complete Auto test—substantial nexus—is at issue because prongs two through four were not contested by American Business. Even though American Business does not dispute that contention, we review whether all four prongs of the test have been met, and discuss each in turn.

(1) There must be a "substantial nexus" with the State.

The facts establish that American Business had more than a slight presence in Florida. Its economic activities and transactions transpired from its principal place of business in Florida, in taking internet orders for flowers, gift baskets, and other tangible personal property and arranging for those items to be located and delivered out of state. The Supreme Court in National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), held that the use tax in that case violated the dormant Commerce Clause because the taxing state lacked the required nexus to tax an out-of-state vendor under these circumstances. That case presented the question of taxation on an out-of-state seller whose only connection with customers in the taxing state was by common carrier or mail. Bellas Hess owned no tangible property in the taxing state, and had no representatives or solicitors there. Orders were sent to a plant outside the taxing state. In holding taxation was improper in that case, the Supreme Court in Bellas Hess distinguished between sellers with retail outlets, solicitors, or property in the taxing state. Id. at 758. Ten years later, in National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977), the Supreme Court affirmed the continuing vitality of Bellas Hess's "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." Nat'l Geographic Soc'y, 430 U.S. at 559 (quoting Bellas Hess, 386 U.S. at 758). In 1992, the Supreme Court reaffirmed the Bellas Hess distinction, for purposes of the Commerce Clause, between businesses that have a physical presence in the state and those whose only contacts with the state are by mail or common carrier. See Quill Corp., 504 U.S. at 314. American Business falls into the first category, having a business location, business property, and business activities in Florida.

This Court has applied the principle set forth in National Geographic, and the distinction discussed there concerning companies that only make sales in a state by mail or common carrier and have no physical presence in the state. In Department of Revenue v. Share International, Inc., 676 So. 2d 1362 (Fla. 1996), we held that a "slight[] presence" of a company in Florida by way of attending a chiropractic seminar for several days each year would be an insufficient nexus to enforce a use tax against the company that sold products by direct mail order to residents in Florida. The Court cautioned, however, that "[i]f such a company has additional connections to the taxing state, then those connections must be analyzed under the 'substantial nexus' test." Id. at 1363 (emphasis omitted). This Court reaffirmed the principle "that out-of-state mail order sales companies . . . which have no physical presence in the taxing state, are immune from state sales or use tax liability." Dep't of Banking & Fin., State of Fla. v. Credicorp, Inc., 684 So. 2d 746, 751 (Fla. 1996) (citing Quill Corp., Nat'l Bellas Hess, and Share Int'l).

Thus, the law is established that without any physical presence in Florida, the sales tax imposed on American Business in this case for its out-of-state sales to out-of-state customers would clearly be in violation of the dormant Commerce Clause. However, the record shows that American Business does have a physical presence in Florida—it is headquartered in Wellington, Florida, and has been doing business in Florida since 2001. From its Florida location, American Business accepts internet orders and arranges for delivery of out-of-state flowers and tangible personal property. Based on the facts of this case, we find that the "substantial nexus" test is met. We turn next to the second prong of the Complete Auto test.

(2) The tax must be fairly apportioned.

The internal consistency test, one component of prong two of the Complete Auto test, helps courts identify tax schemes that, in operation and application, would discriminate against interstate commerce. The test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1802

(2015) (quoting Jefferson Lines, 514 U.S. at 185). "By hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State's tax scheme." Id. "[T]ax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States" are "typically unconstitutional." Id. "[T]ax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes" are not typically unconstitutional.[3] Id.

In the present case, if all states taxed only the entity initially receiving the order for flowers, and not the florist to whom the flower order and delivery is referred, then no florist would be taxed twice. Jefferson Lines also explained that a "failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax." 514 U.S. at 185. But, "[i]f every state were to impose [an identical tax] . . . no sale would be subject to

3. However, the Supreme Court also noted, "Our cases have held that tax schemes may be invalid under the dormant Commerce Clause even absent a showing of actual double taxation." Wynne, 135 S. Ct. at 1802 n.5.

more than one State's tax." Id. That principle applies equally to the tax at issue in this case.[4]

We are also mindful of the principle discussed in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive." Id. at 142. Thus, the Supreme Court has allowed some incidental effect on interstate commerce if the statute generally operates in an even-handed and non-discriminatory manner and the state is not attempting to take

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4. The tax, if enacted by all states in substantially the same form as Florida's, would not present a serious risk of multiple taxation. Amici cite the rare case where an out-of-state florist may travel into Florida to deliver the flower order it received in its home state and is determined under the statute to also be a florist "located in" Florida; or where a florist that has an out-of-state branch and a Florida branch, and is a registered dealer in both states, refers its out-of-state order to its Florida branch. We do not consider arguments raised by amici curiae that were not raised by the parties. See, e.g., Riechmann v. State, 966 So. 2d 298, 304 n.8 (Fla. 2007). Even if we consider such argument, instances of possible multiple taxation due only to the specific business model of certain businesses, which may subject those businesses to multiple taxation in rare circumstances, do not demonstrate that the Florida tax is placing interstate commerce at the mercy of states that might impose the same tax; and these examples do not show that Florida is attempting to garner more than its fair share of taxes. Moreover, the facts upon which the as-applied challenge operates do not fall into either of the two examples of possible multiple taxation cited by the amici.

more than its fair share of taxes. We conclude the same can be said of the tax at issue in this case.

As to the second component of prong two—external consistency—the Supreme Court explained in Jefferson Lines that "[e]xternal consistency . . . looks not to the logical consequences of cloning [the statute], but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." 514 U.S. at 185.

American Business contends in this case—albeit in its argument concerning prong one of the Complete Auto test and not prong two—that it is being taxed on out-of-state sales that are not consummated until delivery is effected out of state, thus the Florida tax should not apply. The Department responds that it is the transaction occurring in Florida that is being taxed in Florida, and that the transaction occurs in Florida where the business facilitated every stage of the transaction from advertising for customers, accepting their orders, receiving payment, and locating and transmitting the orders to third-party florists. We agree with the Department that because the statute taxes the transaction that occurs in Florida by the business engaging in business here, and not on the items sold or the activities occurring out of state, prong two of the Complete Auto test is met.

(3) The tax must not discriminate against interstate commerce.

The Supreme Court in Jefferson Lines described a tax that discriminates against interstate commerce as one that provides a direct commercial advantage to local business. 514 U.S. at 197. "States are barred from discriminating against foreign enterprises competing with local businesses . . . and from discriminating against commercial activity occurring outside the taxing State." Id. (internal citations omitted). Section 212.05(1)(*l*), Florida Statutes, contains no provision that affords preferential treatment or any commercial advantage to a Florida business over an out-of-state business. It simply requires that florists located in Florida are liable for sales taxes on sales transactions regardless of where or by whom the items are to be delivered. The statute exempts from the tax florists located in Florida that receive payments from other florists for items delivered to customers in this state. Thus, where a Florida florist receives an order and payment from another florist for delivery of flowers to customers in Florida, the Florida "delivering" florist will not pay the tax; and, if the other state has a statute similar to Florida's, the "referring" florist in that other state will be the one that is liable to remit the tax in that state if similar tax provisions apply. Similarly, where a Florida florist such as American Business sends an order for flowers or other items to an out-of-state florist to be delivered out of state, then the Florida florist is responsible for collecting and remitting the sales tax to the State of Florida.

Therefore, the statute does not discriminate against interstate commerce or provide a direct commercial advantage to local business. Finally, we examine prong four of the Complete Auto test.

(4) The tax must be fairly related to the services provided by the state.

The Department of Revenue contends that the tax in this case is fairly related to the services provided by the State because American Business, like other Florida residents or businesses, benefits from the state's resources and services. This inquiry is closely connected to the nexus prong and serves to ensure that a state's tax burden is not placed on persons who do not benefit from services provided by the State. See Quill Corp., 504 U.S. at 313 ("The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce."). As noted earlier, the Supreme Court in Jefferson Lines explained that "the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State," but "[t]he fair relation prong of Complete Auto requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." 514 U.S. at 199. Also as we noted earlier, and as the Supreme Court explained in Jefferson Lines, "police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of the tax." Id. at 200 (citing Goldberg, 488 U.S. at 267). The test "asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State." Id. "[T]he constitutional power of a state to tax does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation." Delta Air Lines, Inc. v. Dep't of Revenue, 455 So. 2d 317, 323 (Fla. 1984). The "practical operation" of the tax allows the State of Florida to exert powers relative to "opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." Id. (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

American Business is physically located in Wellington, Florida, and operates its business from that location. It benefits from the public safety agencies of the state, as well as other infrastructure and public amenities paid for by state taxes. It benefits from the orderly, civilized society that is afforded it by the State of Florida. American Business has by its presence and transactions in Florida availed itself of the opportunities and protections made possible in part by the taxes imposed on its sales transactions. Thus, there is a reasonable relationship between the company's presence and activities in the state and the tax at issue.

For all the foregoing reasons, we find that all four prongs of the Complete Auto test have been satisfied and section 212.05(1)(*l*) does not violate the dormant Commerce Clause.

Due Process Claim

American Business also claims that the tax at issue is a violation of the Due Process Clause of the United States Constitution. The district court found no violation of due process and we agree. Due process requires only that there be some minimal connection between the State and the transaction it seeks to tax. The Supreme Court in Quill Corp., citing Bellas Hess, essentially found that "some sort of physical presence within the State" is sufficient, and necessary, for jurisdiction under the Due Process Clause. Quill Corp., 504 U.S. at 307.

In the present case, American Business has a physical presence and does business within the state. We have concluded that American Business's activities have a substantial nexus to Florida. Thus, the minimum connection required to satisfy due process is also met. No due process violation is present on the facts of this case.

CONCLUSION

Based on the foregoing analysis, we quash the decision of the Fourth District Court of Appeal in American Business USA Corp. v. Department of Revenue to the extent that it holds that the assessment of sales tax on sales of flowers, gift baskets, and other items of tangible personal property ordered by out-of-state customers for out-of-state delivery violates the dormant Commerce Clause of the United States Constitution.

It is so ordered.

PARIENTE, QUINCE, and PERRY, JJ., concur.
LEWIS, CANADY, and POLSTON, JJ., concur in result.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the District Court of Appeal – Statutory or Constitutional Invalidity

Fourth District - Case No. 4D13-1472

(Broward County)

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for Amici Curiae American Association of Attorney – Certified Public Accountants, Inc. and Florida Association of Attorney – Certified Public Accountants, Inc.

Third District Court of Appeal
State of Florida

Opinion filed May 25, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-1684
Lower Tribunal No. 09-65428

Renato Bevilacqua,
Appellant,

vs.

U.S. Bank, N.A.,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

Law Offices of Isaac Benmergui and Lauren J. Luck, for appellant.

Akerman LLP, Nancy M. Wallace (Tallahassee), William P. Heller (Fort Lauderdale) and Eric M. Levine (West Palm Beach), for appellee.

Before SUAREZ, C.J., and ROTHENBERG and EMAS, JJ.

EMAS, J.

Renato Bevilacqua appeals an order denying his motion to dismiss or quash service of process made pursuant to the laws of Italy and the Hague Convention. Because U.S. Bank established prima facie evidence of proper service, and Bevilacqua failed to meet his burden of establishing that he lacked actual notice of the proceedings or that he was prejudiced as a result of the alleged deficiency in service of process, we affirm.

FACTS

In 2009, U.S. Bank filed a foreclosure action on a Miami Beach property owned by Bevilacqua. U.S. Bank filed a return of service indicating that Bevilacqua was personally served at the Miami Beach property. Bevilacqua did not respond to the complaint and, in 2012, U.S. Bank eventually obtained a default final judgment against Bevilacqua. Three months after the final judgment was entered, Bevilacqua filed a motion to quash service of process, asserting in an affidavit that he resided in Italy, he had never been served, and he had no prior knowledge of the lawsuit. The trial court vacated the default final judgment, and ordered U.S. Bank to serve Bevilacqua in Italy.

In April 2013, U.S. Bank sought, and the trial court entered, an order appointing an international process server, who submitted a request to the Court of Appeals of Rome, the designated Central Authority of the Government of Italy under Article 5 of the Hague Convention. The Court of Appeals of Rome provided the summons and complaint to process server Bruno Roselli to effectuate service on Bevilacqua in Italy.

Roselli returned a proof of service which indicated that service on Bevilacqua was effectuated on June 28, 2013. The proof of service stated that Roselli "did not find anybody at the abovementioned domicile and because of the absence of any suitable person according to the law to whom [he] could leave the papers," and that he "found the building closed and without doorkeeper." Roselli stated that, as a result, he served Bevilacqua pursuant to Article 140 of the Italian Code of Civil Procedure[1] by filing the service of process with the local town hall on June 28, 2013, by affixing a sealed notice of filing at Bevilacqua's home doorway on the same date, and by sending Bevilacqua a notice by registered mail.

Thereafter, the Court of Appeals of Rome, in accordance with Article Six of the Hague Convention, issued an attestation that service of process upon Bevilacqua was perfected in accordance with the laws of Italy.

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[1] Article 140 is similar to Florida's constructive service statute and allows an alternative form of service when it is not possible to obtain personal service:

> If it is not possible to make service due to unavailability or incapacity or refusal of the persons mentioned in the preceding article, the process server shall deposit a copy at the home where service is to be done, affixing a notice of deposit in a sealed envelope at the door of the recipient's home, office, or company, notifying service by registered letter with return receipt.

On September 30, 2013, Bevilacqua filed a motion to dismiss the case or to quash the international service of process on the ground it did not comply with Italian law. Specifically, Bevilacqua asserted that service pursuant to Article 140 can be made only after the process server has attempted service through the methods set forth in Articles 138 and 139.[2] Bevilacqua asserted that the process server did not perfect service in accordance with Articles 138 and 139. Bevilacqua also filed an affidavit in which he averred that he was never served, never received any papers, had a callbox in front of his apartment, and the service return "clearly provides that the process server made no attempts to call me or one of my family members on the callbox or call any of my neighbors on the callbox."

U.S. Bank responded to the motion to quash or dismiss, contending that the process server did comply with Articles 138-140 of the Italian Code of Civil Procedure; that the return of service established that he attempted to personally serve Bevilacqua at his home; and that when he was unable to serve Bevilacqua or anyone legally authorized to accept service, he served Bevilacqua pursuant to Article 140. U.S. Bank also argued that Bevilacqua's affidavit failed to rebut the return of service.

[2] Articles 138 and 139 provide, for example, that service of process may alternatively be made at the normal place of abode, substituted service on an individual residing in the home, personal service at the place of employment or by substituted service upon another individual working at the company, and substituted service upon a neighbor.

Following a hearing, the trial court denied Bevilacqua's motion to dismiss or quash. This appeal followed, and we review the trial court's legal determinations *de novo*. Puigbo v. Medex Trading, LLC, 39 Fla. L. Weekly D2094, *1 (Fla. 3d DCA 2014); Robles-Martinez v. Diaz, Reus & Targ, LLP, 88 So. 3d 177 (Fla. 3d DCA 2011); Portalp Intern. SAS v. Zuloaga, 40 Fla. L. Weekly D2791 (Fla. 2d DCA December 18, 2015).

ANALYSIS

Under Florida law, "[s]ervice of process on persons outside the United States may be required to conform to the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters." § 48.194(1), Fla. Stat. (2015). The Hague Convention, a treaty to which the United States and several other countries are signatories, is "superior to that of any State and local law." Larry M. Roth, An Introduction to the Hague Convention on Service of Process Abroad, 31 No. 4 Trial Advoc. Quarterly 13, 13 (2012). "It was a specific goal of the Convention to establish an acceptable, efficient, but formalized method by which personal service of original process in a foreign country could be effectuated without offending the internal law of that country." Id. at 13-14. "In Florida, the Hague Convention applies in all cases 'where there is an occasion to transmit a judicial or extrajudicial document for service abroad." Zuloaga, 40 Fla. L. Weekly D2791 at *1. Finally, "[a]s a ratified treaty, the Hague Convention is of equal dignity with acts of Congress and enjoys the constitutional status of 'supreme Law of the Land.'" Alvarado-Fernandez v. Mazoff, 151 So. 3d 8, 12 (Fla. 4th DCA 2014).

Under the Hague Convention, each contracting State, such as Italy, "shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States [such as the U.S.]." See Hague Convention, art. 2. If the Central Authority determines that the request complies with the provisions of the Hague Convention, it must then "serve the document or shall arrange to have it served by an appropriate agency" in accordance with its internal laws. Id. at arts. 4 and 5. Once service has been effectuated, the Central Authority "shall complete a certificate in the form of the model annexed to the present Convention . . . [which] shall state that the document has been served." Id. at art. 6. Of significance, "the return of the central authority's completed certificate of service is prima facie evidence of service by the central authority." Koechli v. BIP Intern., Inc., 861 So. 2d 501, 503 (Fla. 1st DCA 2003). See also, Puigbo, 39 Fla. L. Weekly D2094 at *2 (holding "[w]hen process is served and return of process is completed by an official of a country that is a signatory to the Hague Service Convention in accordance with Article 6 of the Convention, as it was here, that service is sufficient, and any additional requirement which may be imposed by Florida law is pre-empted"); Semet Lickstein Morgenstern Berger Friend Brooke

& Gordon, P.A. v. Sawada, 643 So. 2d 1188, 1189 (Fla. 3d DCA 1994) (holding that "[w]here process is served and return of process completed by an official of a country that is a signatory to the Hague Convention . . . the imposition of any additional requirements 'offends against the supremacy clause of the United States Constitution'")(quoting MacIvor v. Volvo Penta of Am., Inc., 471 So. 2d 187, 188 (Fla. 3d DCA 1985)); Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383, 1390 (8th Cir. 1995) (holding that "[b]y not objecting to the documents and by certifying service, the Central Authority indicated that the documents complied with the Convention and that it had served them in compliance with the Convention, i.e., that it had made service as [the State's] law required"); Northshore Reg. Med. Ctr., LLC v. Dill, 12-850 (La. App. 1 Cir. 3/22/13), 115 So. 3d 475, 481 (declining "to look beyond" the Central Authority's certificate of service in determining whether service was properly effectuated).

Therefore, the duly executed return of process and certificate of service from the Central Authority is prima facie evidence that service was sufficient, leaving available to Bevilacqua only a claim that he was denied constitutional due process or that he was somehow prejudiced by the allegedly deficient service of process: "[T]o rebut the prima facie case established by the completed certificate of service requires a defendant to show lack of actual notice of the proceedings or that the defendant was prejudiced in some way as a result of the alleged deficiency." Myrtle v. Graham, 2011 WL 446397 at *2 (E.D. La. 2011). See also, Puigbo, 39 Fla. L. Weekly D2094 at *2 (holding that where there was evidence that defendant had actual knowledge of the case, due process requirements were met). Bevilacqua did not and cannot assert that he did not have actual notice of the proceedings. While Bevilacqua's affidavit avers that he was "never served" and "never received the above-captioned lawsuit" or "any papers," the record affirmatively establishes that Bevilacqua was aware of, and appeared in this lawsuit even prior to the date service was effectuated in Italy. As discussed earlier, after the default final judgment was entered, Bevilacqua's counsel entered a limited notice of appearance and succeeded in obtaining an order vacating that default final judgment and directing U.S. Bank to serve Bevilacqua in Italy. Given Bevilacqua's actual knowledge of the lawsuit, and the absence of any prejudice from the allegedly deficient service, the trial court properly denied the motion to quash.[3]

CONCLUSION

Bevilacqua's contention that service of process was deficient under Italian law fails to carry the day, given that the Italian Central Authority, pursuant to its own laws and the Hague Convention, returned a certificate attesting to the fact that

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[3] We find the other issues raised on appeal by Bevilacqua are not meritorious and require no further discussion.

service was properly effectuated. This certificate established prima facie evidence of proper service, which the trial court properly did not look beyond. Bevilacqua could overcome this prima facie evidence only by alleging and establishing a lack of actual notice of the proceedings or that he was prejudiced as a result of the alleged deficiency. Because Bevilacqua failed to meet this burden, we affirm the trial court's order denying the motion to quash.[4]

Affirmed.

[4] While we affirm the trial court's order insofar as it denied Bevilacqua's motion to quash, we dismiss for lack of jurisdiction that portion of the appeal seeking review of the court's order denying Bevilacqua's motion to dismiss for failure to serve initial process within the 120- day time limit provided under Florida Rule of Civil Procedure 1.070(j). See Nat'l Powerboat Ass'n, Inc. v. Calabro, 652 So. 2d 508 (Fla. 3d DCA 1995) (holding that an order denying a motion to dismiss for failure to comply with time requirement under rule 1.070(j) is a nonfinal, nonappealable order).

Third District Court of Appeal
State of Florida

Opinion filed May 25, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-2091
Lower Tribunal No. 13-15087

944 CWELT-2007 LLC and Amelia Guerra,
Petitioners,

vs.

Bank of America, N.A.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Jose M. Rodriguez, Judge.

PA Bravo, P.A., and Paul Alexander Bravo and Ruzy Behnejad, for petitioners.

Aldridge | Pite, LLP, and Matthew A. Ciccio (Delray Beach), for respondent.

Before ROTHENBERG, SALTER and SCALES, JJ.

SCALES, J.

Petitioners Amelia Guerra and 944 CWELT-2007 LLC ("CWELT") seek certiorari review of the trial court's order denying a motion to cancel a foreclosure sale. Because there was a pending rule 1.530 motion for rehearing directed toward the foreclosure judgment at the time of the foreclosure sale, we grant the petition.

On April 26, 2013, Bank of America, N.A. (the "Bank") filed a foreclosure complaint against Guerra and her condominium association, 944 Condominium Incorporated (the "Association"). The Bank's foreclosure action sought to foreclose a mortgage on Guerra's condominium unit that secured a loan that the Bank made to Guerra in 2007.

At the time the Bank's foreclosure complaint was filed, a separate foreclosure action by the Association against Guerra was pending. The Association's action sought to foreclose the Association's lien for unpaid condominium assessments. On August 22, 2013, CWELT was issued a certificate of title to the unit after placing the winning bid in the sale held in the Association foreclosure action.

On May 5, 2015, a bench trial was held in the Bank's foreclosure action, and a final judgment of foreclosure was entered in the Bank's favor. The judgment set a foreclosure sale for June 29, 2015.

On May 20, 2015, Petitioners (defendants in the Bank's action) timely filed a rule 1.530 motion for rehearing directed toward the Bank's judgment. On June

26, 2015, the trial court cancelled the June 29, 2015 foreclosure sale date pursuant to Petitioners' motion to cancel the sale on the basis that the final judgment had not yet rendered. The trial court rescheduled the foreclosure sale for August 10, 2015.

Because Petitioners' motion for rehearing remained pending on the rescheduled August 10, 2015 sale date, Petitioners filed a second motion to cancel the foreclosure sale. This motion to cancel the sale was heard by the trial court on the morning of the scheduled sale. The trial court summarily denied the motion and the foreclosure sale proceeded. Respondent Tania Cienfuegos was named the winning bidder of the unit at the foreclosure sale. The Petitioners' rule 1.530 motion has not been adjudicated and remains pending.

Petitioners' seek certiorari review of the trial court's summary order denying their motion to cancel the foreclosure sale.[1]

It is well settled that a foreclosure sale cannot be held while a timely motion for rehearing is pending because enforcement of a final judgment is suspended by the filing of the rehearing motion. United Invs. Ltd. P'ship v. Resolution Tr. Corp., 566 So. 2d 370, 370 (Fla. 3d DCA 1990) (Mem). Accordingly, the trial court erred by not cancelling the August 10, 2015 foreclosure sale, and the foreclosure sale must be set aside. See Hoffman v. BankUnited, N.A., 137 So. 3d 1039 (Fla. 2d DCA 2014) (Mem).

[1] We consider the Bank's decision not to file a response to the petition as the equivalent of a confession of error.

Based on the foregoing, we grant the petition, quash the order denying Petitioners' motion to cancel the sale of foreclosure, direct the trial court to set aside the foreclosure sale to Cienfuegos, and remand for proceedings consistent herewith.

Petition granted.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF CSAB 2007-1,
Appellant,

v.

RICHARD CLARKE a/k/a **RICHARD C. CLARKE, PAULA PRINSEN, BROWARD, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,** and any unknown heirs, devisees, grantees, creditors, and other unknown persons or unknown spouses claiming by, through and under any of the above-named defendants,
Appellees.

No. 4D14-3398

[May 25, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Kathleen D. Ireland, Judge; L.T. Case No. CACE08-061787 (11).

Nancy M. Wallace of Akerman LLP, Tallahassee, William P. Heller of Akerman LLP, Fort Lauderdale and Joseph S. Troendle of Akerman LLP, Jacksonville, for appellant.

Jonathan Kline of Jonathan Kline, P.A., Weston, for Appellee Richard Clarke.

PER CURIAM.

U.S. Bank National Association, as Trustee for the Holders of CSAB 2007-1 ("U.S. Bank"), appeals a final judgment in favor of the borrower in U.S. Bank's foreclosure action. Because U.S. Bank proved its entitlement to foreclose, we reverse and remand for entry of judgment in U.S. Bank's favor.

U.S. Bank filed a foreclosure complaint against the borrower, attaching a copy of the note with a blank endorsement. The case eventually proceeded to trial.[1] After trial, the court ruled that U.S. Bank lacked standing for two reasons: (1) the trust named as the plaintiff was not the same as the trust named in the Power of Attorney for the servicer of the loan; and (2) there was no evidence presented that U.S. Bank was in possession of the note at the time the lawsuit was filed. However, the court found that U.S. Bank proved damages and proved its compliance with Paragraph 22 of the mortgage. U.S. Bank appealed the trial court's ruling.

We apply a *de novo* standard of review to the question of whether a plaintiff proved its standing to bring an action. *Dixon v. Express Equity Lending Grp.*, 125 So. 3d 965, 967 (Fla. 4th DCA 2013).

The plaintiff's standing is a crucial element in any mortgage foreclosure proceeding and must be established at the inception of the lawsuit. *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). A plaintiff has standing to foreclose if it is entitled to enforce the promissory note under Florida's enactment of the Uniform Commercial Code. *See, e.g.*, *Kenney v. HSBC Bank USA, Nat'l Ass'n*, 175 So. 3d 377, 379 (Fla. 4th DCA 2015).

Where a copy of a note is attached to a complaint and the plaintiff later files with the court the original note in the same condition as the copy attached to the complaint, "the combination of such evidence is sufficient to establish that the [plaintiff] had actual possession of the note at the time the complaint was filed and, therefore, had standing to bring the foreclosure action, absent any testimony or evidence to the contrary." *Ortiz v. PNC Bank, Nat'l Ass'n*, 4D15–242, 41 Fla. L. Weekly D605, 2016 WL 1239760 at *2 (Fla. 4th DCA Mar. 30, 2016). This rule is consistent with case law from our sister courts. *See, e.g.*, *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So. 3d 1222, 1223 (Fla. 2d DCA 2014) (concluding that there was sufficient evidence of standing when the note attached to the original complaint contained the blank endorsement and the plaintiff introduced the original note at trial).

We need not look to the Power of Attorney to determine the issue of standing, as U.S. Bank's standing turns on whether it was entitled to

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[1] Without further comment, we reject the borrower's suggestion in the answer brief that U.S. Bank's witness had no authority to testify. U.S. Bank's ability to call the witness derived from the evidence code, not from the terms of the Power of Attorney. It is well-settled that any witness may testify as to matters within the witness's personal knowledge. *Serrano v. State*, 15 So. 3d 629, 638 (Fla. 1st DCA 2009).

enforce the note from the outset of the case.[2] Here, the copy of the note attached to the complaint contained a blank endorsement. Moreover, the original note was introduced into evidence at trial and matched the copy of the note attached to the complaint. This combination of evidence was sufficient to establish, absent any testimony or other evidence to the contrary, that U.S. Bank had possession of the blank-endorsed note at the time the complaint was filed and therefore had standing to bring the foreclosure action as the holder of the note.

Finally, because the trial court specifically found that U.S. Bank proved its damages and proved its compliance with the conditions precedent to foreclosure, we reverse and remand for entry of judgment in favor of U.S. Bank.

Reversed and Remanded.

CIKLIN, C.J., TAYLOR and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

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[2] In any event, any difference between the wording of the trust named in the Power of Attorney and the wording of the trust named in the complaint appears to be immaterial.