IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA APPELLATE DIVISION

Appellate Case No: 10-20351
Lower Tribunal Case No.: 07-14794

AUSTIN & LAURATO, P.A.,

Appellant,

vs.

SUSAN DEMICHELLE d/b/a DEMICHELLE DEPOSITION REPORTERS OF NORTHERN CA.,

Appellee.

APPELLANT'S INITIAL BRIEF

ARDYN V. CUCHEL, ESQUIRE
Florida Bar No: 0713759
THE LAW OFFICE OF
ARDYN V. CUCHEL, P.A.
1902 West Cass Street
Tampa, Florida 33606
Telephone: (813) 253-3051
Facsimile: (813) 258-4625
ardynvcuchelpa@yahoo.com
COUNSEL FOR APPELANT

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE**

STATUTES

PRELIMINARY STATEMENT

Appellee prepared this Initial Brief in accordance with Florida Rule of Appellate Procedure 9.210(c). Appellant, Austin & Laurato, P.A., shall be referred to as "Austin & Laurato" or Appellant. Appellee, Susan DeMichelle d/b/a DeMichelle Deposition Reporters of Northern CA, shall be referred to as DeMichelle or Appellee. Reference to the Record on Appeal shall be designated by the symbol "R", followed by the volume, followed by the appropriate page number(s). (e.g., R. v. 1 pp. 3-16). References to the supplement transcript of the trial shall be designated by the symbol "R", followed by the page number as provided in the Index to Record on Appeal. (e.g., R. p. T1).

STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment after a non-jury trial for a declaratory judgment claim, seeking to void a foreign judgment which was filed in Hillsborough County, by Appellee, in attempt to domesticate the judgment. Appellee, acting as pro se plaintiff, initially filed a complaint in California small claims court on March 11, 2008. (R. v. 1 p. T67). The complaint named "Michael Laurato d/b/a Austin & Laurato, P.A." as the defendant. (R. v. 1 p. 52). There is no recognized legal entity of "Michael Laurato, Esquire, d/b/a Austin & Laurato, P.A." (R. v. 1 p. 53). No party appeared in court or filed any answer or paper in response to the Appellee's California small claims action. (R. v. 1 p. T70). Accordingly, on or about May 20, 2008, the California Court entered a default judgment in the amount of $641.65 (principal) and $ 30.00 (costs) against "Michael Laurato, Esq. dba Austin & Laurato, P.A." (R. v. 1 p. 8).

On or about March 3, 2009, Appellee filed a Notice of Recording Foreign Judgment in the Public Records of Hillsborough County. (R. v. 1 p. 7). On August 4, 2009, Appellant filed a declaratory judgment action seeking to declare the foreign California default judgment filed and domesticated within Hillsborough County void and unenforceable as to Michael V. Laurato, personally, and as to Austin & Laurato, P.A.. (R. v. 1 p. 4-9). Appellant challenged the judgment as void because the California small claims Court lacked the appropriate subject

matter jurisdiction and personal jurisdiction over the parties. (R. v. 1 p. 4-9). Appellant argued that the required service of process was not obtained at any time, and no process could ever be served upon the entity, "Michael Laurato, Esquire d/b/a Austin and Laurato, P.A.," because it does not exist. (R. v. 1 p. 52-57).

On or about June 14, 2010, subsequent to the filing of the subject declaratory judgment action, Appellee filed a Request for Court Order with the California Court, asking that the Court amend the defendant's name "after judgment" to "Michael V. Laurato and Austin & Laurato P.A. (R. v. 1 p. 74-78). The California Court granted the Appellee's request to amend on July 6, 2010 (R. v. 1 p. 75-78). Despite the California Court's post-judgment granting of Appellee's request to amend the defendant's name from "Michael Laurato Esq. dba Austin & Laurato P.A." to "Michael V. Laurato and Austin & Laurato P.A.", the California Court never entered an amended judgment in the name of "Michael V. Laurato and Austin & Laurato P.A.", and no such amended judgment has ever been filed in Hillsborough County, Florida. (R. v. 1 p. T13). The only foreign judgment which was filed in Hillsborough County, Florida, and at issue in the underlying declaratory judgment action, was the judgment against the non-existent entity of "Michael Laurato Esq. dba Austin & Laurato P.A.". (R. v. 1 p. T13).

On October 25, 2010, a final non-jury hearing on the declaratory judgment action was held before the Honorable Eric R. Myers. (R. v. 1 p. T1). Counsel for

Appellee argued, during opening statement, that Mr. Franco was served with the original complaint. (R. v. 1 p. T15). However, Appellant offered no testimony that Mr. Franco was ever actually served. (R. v. 1 p. T108). During Appellant's case in chief, appellant called the following witnesses to testify: Cesar R. Romero, John Earnest Franco, Jr., and the Appellee, Susan DeMichelle: (R. v. 1 p. T19, T39, T64).

Cesar R. Romero testified that in March of 2008 he was employed by Appellant and was acting as their registered agent. (R. v. 1 p. T20). Mr. Romero testified that as registered agent it was his job to accept service of process of documents, and that no one else at the office was authorized to accept service of process in his absence. (R. v. 1 p. T20-21). Mr. Romero further testified that he was never served with a summons and complaint in the action titled Susan DeMichelle dba DeMichelle Deposition Reporters of Northern CA vs. Michael Laurato, Esquire dba Austin & Lauato P.A. (R. v. 1 p. T21).

John Franco testified that he was not authorized to accept service of process on behalf of Appellant. (R. v. 1 p. T44-45). Mr. Franco further testified that he was not served with the complaint in the California action. (R. v. 1 p. T44-45). He further stated that he never had a conversation with a process server in regards to the California action or any service of process issue pertaining to the California action. (R. v. 1 p. T44-45). Mr. Franco testified that he was never approached and

had no knowledge as to any process server encounter with regards to the California case. (R. v. 1 p. T113).

Appellee testified that her employee contacted a Florida process server to serve the original California law suit, and that service was effectuated. (R. v. 1 p. T69). Appellee testified that she had no knowledge as to how service of process was made. (R. v. 1 p. T69). Appellee further testified that she did not contact a process server to serve the amended judgment on the defendant. (R. v. 1 p. T73). She testified that the clerk of the court in California told her that a copy of the document granting the amendment was "sent to Laurato" by the court. (R. v. 1 p. T73).

Upon the close of Plaintiff's case in chief, counsel for both parties made motions for directed verdict; the Appellee did not call any witnesses to testify. (R. v. 1 p. T80). Instead, the Appellee relied upon an affidavit of a process server, submitted by Appellee, alleging that John Franco accepted service and indicated to the server that he had authority to do so. (R. v. 1 p. T113). The lower court permitted the affidavit, Defendant's Exhibit 4, to be submitted into evidence without it being a certified copy, without any witness to authenticate the document, and over Appellant's hearsay objection. (R. v. 1 p. T117).

The Appellee also relied upon a copy of the annual report for Austin & Laurato, P.A., arguing that John Franco was a signing officer or director for the

firm, and had authority to act on its behalf. (R. v. 1 p. T87). With respect to the annual report which Mr. Franco was questioned about, Mr. Franco testified that he had no recollection of electronically signing the annual report, and that he didn't usually handle filing the annual reports. (R. v. 1 p. T60-61). The Court ultimately allowed the copies of the annual report to be admitted into evidence, without certification or authentication and over Appellant's hearsay objection. (R. v. 1 p. T117).

Based upon the evidence presented, the Court granted the Appellee's motion for direct verdict. Specifically, the Court found that John Franco had the actual, apparent or implied authority to accept service of process on behalf of Austin & Laurato, P.A., for the underlying California Case. (R. v. 1 p. 79-80). The Court further found that despite the argued ambiguity in the style of the California case, the amendment of the style of the California case was not a substantive change, and therefore the amendment was proper. (R. v. 1 p. 79-80). The Court concluded that service of process for the underlying California judgment was proper on Austin & Laurato, P.A., and the firm was properly named in the domesticated California judgment. (R. v. 1 p. 79-80). Thus, the Court entered judgment in favor of the Appellee, specifically holding the foreign judgment to be null and void as to Plaintiff Michael V. Laurato, personally, but enforceable as to Austin & Laurato,

P.A. (R. v. 1 p. 83-84). The Appellant timely filed its notice of appeal with this Court. (R. v. 1. p. 93-96).

SUMMARY OF ARGUMENT

The trial court committed a series of errors throughout the trial which culminated in three major erroneous findings: (1) the lower court erroneously found that the Appellant was properly served with the original foreign complaint and therefore the judgment entered was enforceable, (2) the lower court erroneously found that the amendment to the original foreign judgment was not substantive and thus did not require separate service of process, and (3) the lower court erred in amending the judgment to include the Appellant, *sua sponte.*

First, based upon the documents in the record, the testimony of the witnesses, and the applicable law, the original foreign judgment was void and not legally enforceable against the Appellant, for the following three independent reasons.

As to the first major error, the underlying complaint and subsequent foreign judgment named Michael Laurato d/b/a Austin & Laurato, P.A. as the defendant. There is no recognized legal entity of "Michael Laurato, Esquire, d/b/a Austin & Laurato, P.A."; accordingly, no service of process could be properly effectuated on the non-existent entity. Consequently, the foreign judgment is void and unenforceable, and the lower court's finding to the contrary must be overturned.

Second, even if an existing entity was named, the trial Court erred in finding that there was actual service of process of the underlying complaint filed in

California. The only evidence offered to establish that service of process was effectuated was an unauthenticated Return of Service Form, and the Appellant offered clear and convincing evidence to refute the document. Therefore, the lower court abused its discretion in finding that service of process was properly effectuated, and its order must be overturned.

Third, in addition to erroneously finding that process had be served upon Mr. Franco, and allowing service of process upon a non-existent legal entity, the Court further erred in finding that John Franco had the actual, apparent or implied authority to accept service of process on behalf of Austin & Laurato, P.A. Mr. Romero was the registered agent of Austin & Laurato, P.A. and was the only individual authorized to accept service of process; therefore, the Court's finding that any process served on Mr. Franco was valid against the Appellant must be overturned.

With regard to the second major error, the Court erred in finding that the foreign judgment which was before it, was enforceable against Austin & Laurato, P.A., because even though the California court allegedly issued an Order amending the original complaint and judgment to change defendant from "Michael Laurato, Esq. dba Austin & Laurato P.A." to "Michael V. Laurato and Austin & Laurato, P.A.", the amendment of the style of the California case was a substantive change and therefore required formal service of process. The California Court never

issued an amended "Notice of Entry of Judgment"; therefore, the amended judgment is not enforceable against the Appellant.

The third and final major error perpetrated by the lower court was its *sua sponte* amendment of the subject judgment to include the Appellant. The lower court lacked jurisdiction to amend the judgment at issue. Furthermore, even if it had jurisdiction to amend the judgment, the lower court could not alter the judgment to add the Appellant because it was not a party to the original action under applicable Florida law.

For the foregoing reasons, the lower court's order finding the subject foreign judgment enforceable against the Appellant must be overturned.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS PROPER SERVICE OF PROCESS OF THE UNDERLYING COMPLAINT UPON THE APPELLANT.

"[D]irected verdicts in non-jury trials are governed by the same rules and principles as in jury trials." *In re Merz' Estate*, 273 So.2d 795, 796 (Fla. 2d DCA 1973). "The standard for reviewing a trial court's ruling on a motion for directed verdict is de novo." *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So.3d 247, 250 (Fla. 4th DCA 2009). "'To the extent the trial court's order is based on factual findings, [this Court] will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review.'" *Verneret v. Foreclosure Advisors, LLC*, 45 So.3d 889, 891 (Fla. 3d DCA 2010) (citing *Colucci v. Kar Kare Auto. Group, Inc.*, 918 So.2d 431, 436 (Fla. 4th DCA 2006). "Findings of fact by a trial judge in a nonjury proceeding will not be set aside on review unless totally unsupported by competent and substantial evidence." *Id.*

In the underlying foreign litigation, service of process was never properly effectuated against the Appellant; therefore, the foreign judgment relied upon by the lower court was not entitled to full faith and credit in Florida and was therefore null and void. *See Whipple v. JSZ Financial Company, Inc.*, 885 So.2d 933 (4th DCA 2004) (holding foreign judgment was not entitled to full faith and credit in

Florida because the trial court lacked personal jurisdiction over defendant/appellant based on invalid service of process under Texas law, and therefore all subsequent proceedings were null and void, including the domestication of the judgment in Florida); *see also* § 412.20, Cal. Stat. (summons shall contain names of the parties to the action).

The trial Court erred in finding that there was adequate service of process on Appellant, Austin & Laurato, P.A., for the following three reasons: (1) legally, no service of process could have been effectuated against the non-existent entity, "Michael Laurato, Esquire d/b/a Austin & Laurato, P.A.," (2) the overwhelming record evidence establishes that no process was ever actually served, and (3) even if process was served, John Franco was not authorized to accept the allegedly effectuated service of process.

A. THE ENTITY, "MICHAEL LAURATO ESQ d/b/a AUSTIN & LAURATO P A" DOES NOT EXIST; THE JUDGMENT ENTERED AGAINST THIS ENTITY IS VOID AND UNENFORCEABLE.

The foreign judgment at issue expressly names "Michael Laurato, Esq. dba Austin & Laurato, P.A." which is not an actual legal entity; therefore, the judgment is void and unenforceable as a matter of law. In determining the validity of a foreign judgment, the law of the state rendering the judgment governs the issue of the judgment's validity. *Whipple* at 935. In California, compliance with the statutory procedures for service of process is essential to establish personal

jurisdiction, and where a summons is not properly served, a resulting judgment is void on its face. *Renoir v. Redstar Corporation*, 123 Cal. App.4th 1145, 1152-4 (CA 2nd DCA 2004).

Pursuant to § 412.20(a)(2), California Statutes, "a summons shall be directed to the defendant . . . and it shall contain: . . . the names of the parties to the action." The entity named in the judgment, "Michael Laurato, Esq., dba Austin & Laurato, P.A." is not incorporated within the State of Florida, does not hold a business license, does not have an employer tax id number, does not maintain a bank account, and does not otherwise engage in any type of business within this State. The Appellant, on the other hand, is legally incorporated as "Austin & Laurato, P.A.," and has never been incorporated as "Michael Laurato, Esq. dba Austin & Laurato, P.A." Furthermore, there is no indication on the record that the summons allegedly served upon John Franco named the Appellant or any entity other than that named in the subject judgment. Therefore, under California law, the summons was not properly served upon the Appellant as it did not expressly name the Appellant.

Moreover, the title "dba", "doing business as", relates to persons or businesses operating under fictitious names, which are required to register such fictitious names, and failure to comply with the applicable registration statute renders such an entity non-existent. *See Progressive Exp. Ins. Co. v. Hartley*, 21

So.3d 119 (Fla. 5th DCA 2009); § 865.09, Fla. Stat. ("A person may not engage in business under a fictitious name unless the person first registers the name with the division . . ."). In *Hartley,* the plaintiff-insurer contended that an assignment of rights was valid where the defendant-insured assigned his rights to insurance benefits to the unregistered name of a doctor's clinic. *Hartley* at 120. The court pertinently observed as follows:

> Progressive contends that pursuant to section 865.09(9)(b), the initial assignment was valid. That section provides that the failure of a business to comply with the fictitious name registration statute does not impair the validity of any contract of such business. While that section may have supported Progressive's argument if the initial assignment was to Durant Chiropractic Clinic, Inc., d/b/a Atlantic Coast Chiropractic Clinic (notwithstanding a failure to comply with the fictitious name registration statute), it provides no relief to Progressive in the instant case. The fact remains that the assignment was made to a non-existent entity.

Id. at 120-1. Thus, the *Hartley* ruling implies that, a "d/b/a" fictitious corporate name that does not comply with the registration statute is a "non-existent entity."

"Austin & Laurato, P.A." is not a fictitious name under which Michael Laurato is doing business, and the fictitious name "Michael Laurato Esq dba Austin and Laurato P A" is not a registered fictitious name in Florida, or anywhere to the knowledge of the Appellant. Thus, the judgment, as received by the Appellant, was expressly intended to be against Michael Laurato, Esq., doing business as a fictitious name, not against a legally registered corporate entity, such as Austin & Laurato, P.A. Accordingly, Appellant, Austin & Laurato, P.A., could

not have been effectively served with process when the process was directed at a fictitious entity and not properly directed at it. § 412.20(a)(2), Cal. Stat.

Under applicable California law, corporations, such as the Appellant, are required to be properly named in legal actions, and properly served according to the applicable rules for serving corporations. *See* § 412.20, Cal. Stat.; 416.10, Cal. Stat. Knowledge by a defendant of a plaintiff's action does not satisfy the requirement of adequate service of a summons and complaint. *Renoir* at 1152. Therefore, the lower court erred in finding that process was properly served upon the Appellant and that the foreign judgment is enforceable against the Appellant.

B. THE APPELLANT PRESENTED CLEAR AND CONVINCING EVIDENCE THAT JOHN FRANCO WAS NEVER SERVED WITH PROCESS; THE ONLY EVIDENCE PRESENTED BY THE APPELLEE TO PROVE SERVICE WAS UNAUTHENTICATED RETURN OF SERVICE.

The Appellant showed by clear and convincing evidence that it was never served with process, and the only evidence presented by the Appellee to refute the Appellant's assertion was unauthenticated hearsay; therefore, the lower court erred in finding that process was served on the Appellant. *See Lazo v. Bill Swad Leasing Co.*, 548 So.2d 1194 (4th DCA 1989). While a return of service which is regular on its face is presumed valid, a Defendant may impeach it by presenting clear and convincing evidence to corroborate his denial of service. *Id.* Clear and convincing evidence requires that witnesses to a fact be credible, that facts testified to must be

distinctly remembered, that testimony be direct and weighty, and that witnesses be lacking in confusion as to facts in issue. *Id.*

The Appellant's witnesses testified that they did not receive service of process of the original California law suit. Appellee did not present testimony from any witness with personal knowledge regarding the issue of service of process. Instead, Appellee argued and relied upon an uncertified, unauthenticated copy of a process server's return of service, to controvert the live testimony of Appellant's witnesses. The return of service alleged that it was served on "John Franco ata who stated that they were authorized to accept for the above in their absence."

Appellee did not call the process server to testify, nor did Appellee call any witness to authenticate the alleged return of service. Accordingly, the Appellant was never afforded the opportunity to cross-examine the process server in order to challenge the validity of the statements made in the return of service. At trial, Appellant argued against the admission of the unauthenticated hearsay evidence, however, the Court allowed the return of service to be admitted into evidence. The return of service was absolutely the only evidence offered to support Appellee's allegation that service of process was effectuated.

During his testimony, John Franco clearly and unequivocally stated that he was not authorized to accept service of process, and that there was a specific office

procedure that he was to follow if and when a process server ever presented. He further testified that he was not served with the complaint in the California case, and that he did not speak with the process server pertaining to the complaint, nor did he advise the process server that he was authorized to accept service of process of the complaint.

While the Appellee highlighted some minor inconsistencies in Mr. Franco and Mr. Romero's testimony, such as who was actually responsible for writing the firm's checks, there were absolutely no inconsistencies, nor any confusion, with regard to each witness' testimony on the service of process issue. Both witnesses clearly testified, without hesitation or question, that Mr. Franco was not authorized to accept service of process on behalf of the Appellee.

While the Court reasoned that Mr. Franco's conduct resulted in apparent authority to accept service of process; however, under *Lazo,* Mr. Franco's testimony, combined with that of Mr. Romero constitutes clear and convincing evidence of lack of service of process, which serves to impeach the return of service . In light of the clear and convincing testimony presented by the Appellant and the dearth of evidence presented by the Appellee, the lower court erred in finding that Mr. Franco, in fact, accepted service of process on behalf of the Appellant.

C. THE APPELLANT PRESENTED CLEAR AND CONVINCING EVIDENCE THAT JOHN FRANCO HAS NO AUTHORITY TO ACCEPT

SERVICE OF PROCESS ON BEHALF OF THE APPELLANT; THE ONLY EVIDENCE PRESENTED TO REFUTE THIS FACT WAS UNAUTHENTICATED INADMISSABLE HEARSAY.

Even assuming the affidavit of service to be true, the affidavit, on its face, fails to establish proper service of process on Austin & Laurato, P.A., as it indicates that the complaint was served upon John Franco, who is not an appropriate person to be served. *See* § 416.10, Cal. Stat.; *see also Renoir v. Redstar Corporation*, 123 Cal. App.4th 1145, 1152 (CA 2nd DCA 2004) (holding compliance with the statutory procedures for service of process is essential to establish personal jurisdiction). Under California law, a summons may be served on a corporation by delivering a copy of the summons and the complaint by any of the following methods: (a) To the person designated as agent for service of process; or (b) To the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process. § 416.10, Cal. Stat.

Mr. Franco testified that he was not authorized to accept service of process on behalf of Austin & Laurato, P.A. Mr. Cesar Romero, the firm's registered agent, also testified that Mr. Franco was not authorized to accept service of process, and that he, Mr. Romero himself, was the only person authorized to accept

service of process on behalf of the firm. The Court erred in relying upon hearsay evidence, by way of the process server's affidavit, which alleged that Mr. Franco stated that he was authorized to accept service of process, despite clear and convincing evidence presented by the Appellants, which impeached the affidavit. The Court further erred in considering the firm's annual report, which was also inadmissible hearsay, in determining that Mr. Franco had the actual, apparent or implied authority to accept service of process upon the firm. Thus, the overwhelming evidence presented was that Mr. Franco was not authorized to accept service of process on behalf of the Appellant.

Mr. Franco was not the person designed as agent for service of process, nor was he the president, chief executive officer, or other head of the corporation, vice president, secretary or assistant secretary, treasurer or assistant treasurer, controller or chief financial officer, general manager, or person authorized by the corporation to receive service of process. Further, the uncontroverted witness testimony was that John Franco was specifically, unauthorized to accept service of process of complaints, and there was no testimony or evidence to suggest that he held one of the aforementioned titles or roles. Therefore, the corporation of Austin & Laurato, P.A., was not properly served, even if the affidavit of service is taken on its face, because the complaint was not served on an authorized person as required by

applicable California law. Accordingly, the lower court's finding that the Appellant was properly served must be overturned.

II. THE TRIAL COURT ERRED IN FINDING THAT THE AMENDMENT OF THE UNDERLYING FOREIGN JUDGMENT TO INCLUDE "MICHAEL LAURATO ESQ AND AUSTIN & LAURATO P A" WAS NOT A SUBSTANTIVE CHANGE REQUIRING FORMAL SERVICE OF PROCESS.

The lower court erred by holding that the amendment to the original foreign judgment was not substantive, requiring formal service of process upon the Appellant. *See Engebretson & Company, Inc. v. Harrison*, 125 Cal. App. 3d 436 (CA 4th DCA 1981). "The review of a trial court's determination of the existence or non-existence of personal jurisdiction involves evaluating the same documentary evidence relied on by the trial court and making an independent determination as to the correct principle of law. This is the *de novo* standard of review." *Ganiko v. Ganiko*, 826 So.2d 391, 393 (Fla. 1st DCA 2002). However, the lower court's factual conclusions are subject to review for abuse of discretion. *See, e.g., Verneret v. Foreclosure Advisors, LLC*, 45 So.3d 889, 891 (Fla. 3d DCA 2010) (factual findings overturned only if trial court abused discretion).

> Where a defendant has failed to appear in the action, service of an amended complaint in the manner provided for service of summons, while not necessarily a requirement for personal jurisdiction, is an essential prerequisite to a valid default judgment. It has been repeatedly held that a defaulting defendant is entitled to be served by an amended complaint when the amendment is as to a matter of substance and not a mere matter of form. The reason for this rule is

> plain. A defendant is entitled to opportunity to be heard upon the allegations of the complaint on which judgment is sought against him.

Harrison at 440.

At trial, the Court was presented with evidence that on June 14, 2010, over two years after the original judgment was entered by the California court, the Appellee filed a request to amend the judgment, as to the defendant's name. Appellee requested that defendant be changed from "Michael Laurato, Esq. dba Austin & Laurato P.A." to "Michael V. Laurato ***and*** Austin & Laurato P.A." This request was granted by the California Court. Appellee admitted that the request or subsequent order granting the request were never formally served upon the Appellant, but rather, Appellee testified that she was told by the clerk of the California court that "a copy was sent to Laurato."

Even assuming that the change to the judgment allegedly authorized by the California trial court would be allowed as an amendment, this amendment was unquestionably of the type that is substantive in nature, in that it changed the named defendant from a non-existent legal entity that could legally bear no responsibility or be subject to any liabilities, to a legally recognized entity, which was subject to legal liability. As explained by the court in *Harrison*, "if the complaint is amended in a way which would materially affect the defendant's decision not to contest the action, this new circumstance should be brought home to the defendant with the same force as the notification of the original action."

Harrison at 442. Furthermore, a default judgment must be vacated if it grants relief not request in the original complaint and the purported amendments to the relief requested are not served on the pertinent defendants. *Id.* at 444.

Accordingly, the Appellant was entitled to receive formal service of process of the amended complaint, since the addition of the Appellant as a named defendant "materially affect[ed] the [appellant's] decision not to contest the action." The amended complaint created the potential for liability on the part of the Appellant, which was absent in the original complaint and judgment. Thus, the Court erred in finding that the amendment was not a substantive change not requiring service of process upon the Appellant, and the judgment entered, as based on the amendment, must be vacated.

III. THE TRIAL COURT ERRED BY MODIFYING THE UNDERLYING FOREIGN JUDGMENT TO INCLUDE THE APPELLANT, *SUA SPONTE.*

The lower court erred by *sua sponte* amending the original foreign judgment to include the Appellant, and finding that the judgment was enforceable against the Appellant. *See* § 55.503, Fla. Stat.; *Hillsborough County v. Lovelace*, 673 So.2d 917, 917-8 (Fla. 2d DCA 1996) (holding "[w]hile court retained jurisdiction to enforce the judgment, it did not have jurisdiction to modify its terms). Once again, review of a trial court's determination of personal jurisdiction is reviewed *de novo. Ganiko v. Ganiko*, 826 So.2d 391, 393 (Fla. 1st DCA 2002). Factual findings are

reviewed for abuse of discretion. *See, e.g., Verneret v. Foreclosure Advisors, LLC*, 45 So.3d 889, 891 (Fla. 3d DCA 2010)

The lower court lacked jurisdiction to modify the foreign judgment at issue. Pursuant to § 55.503, Florida Statutes, the foreign judgment, as recorded in Florida, " shall be subject to the same rules of civil procedure, legal and equitable defenses, and proceedings for reopening, vacating, or staying judgments, and it may be enforced, released, or satisfied, as a judgment of a circuit or county court of this state." Thus, Florida law for "reopening" a judgment applies to the subject judgment. Accordingly, the lower court lacked jurisdiction to modify the judgment on its own volition. *Lovelace* at 917-8. Thus, because an amended judgment was never recorded in this state and the lower court lacked jurisdiction to amend the judgment *sua sponte*, the lower court's finding that the Appellant is properly named in the subject judgment must be overturned.

Furthermore, even if the lower court had jurisdiction to amend the judgment, judgment may not be entered against the Appellant because it was not a party to the original complaint. *See Vias Del Austro Compania Limitada v. O. E. Miami Corp.*, 415 So.2d 107, 107 (Fla. 3d DCA 1982); *RHPC, Inc. v. Gardner*, 533 So.2d 312, 314 (Fla. 2d DCA 1988) (citing 19 Am.Jur.2d Corporations § 2216 (1986)) ("Corporations are legal entities and should sue and be sued in their corporate name"). *Friedus v. Friedus*, 89 So.2d 604 (Fla. 1956) (reversing judgment against

corporation "not made a party to the cause nor served with process," and judgment entered "simply because its principal stockholder was a party to the cause"); *Barkett v. Hardy*, 571 So.2d 13, 13 (Fla. 2d DCA 1990)(finding clear error where trial court entered judgment against corporation not named as a defendant vis-à-vis pertinent count); *HCA Health Services of Florida, Inc. v. Ratican*, 475 So.2d 981, 981 (Fla. 3d DCA 1985) (citing *Virginia-Carolina Chemical Corp. v. Smith*, 164 So. 717 (Fla. 1935) ("An order is not binding upon an entity which has not been made a party to the proceedings). In *Vias Del Austro,* the Third District vacated a default judgment and order taxing costs entered against a corporation where the record indisputably reflected that the corporation was not named as a defendant in the suit out of which judgment against it arose, was never served with process, was never notified of a trial after default was entered against it, and did not participate or acquiesce in the proceedings in any manner. *Vias Del Austro* at 107.

The judgment before the lower court expressly named "Michael Laurato, Esq. dba Austin & Laurato, P.A.," and no amendment of the judgment was ever recorded in Florida. Therefore, because the judgment is clearly and unequivocally NOT entered against the Appellant, Austin & Laurato, P.A., *see* Section I. A., *supra,* the Appellant was never served with process, *see* Sections I. B. & I. C., *supra,* and did not participate or acquiesce in the California proceedings, the lower

courts order finding the foreign judgment enforceable against the Appellant must be reversed.

CONCLUSION

The lower court's entry of directed verdict must be overturned and judgment entered rendering the subject foreign judgment void and unenforceable. Thus, as a matter of law, the subject foreign judgment is void because the defendant it expressly names is a non-existent entity, and therefore, service of process could not be properly effectuated. Moreover, the lower court abused its discretion in finding that process was, in fact, served upon John Franco, on behalf of the Appellant. Notwithstanding the critical flaw in the party names referred to in the subject foreign judgment, the Appellant presented clear and convincing evidence at trial to prove that John Franco was never actually served with any papers, and that he was not authorized to accept service on behalf of the Appellant. Additionally, the lower court erred in finding that the alleged amendment of the subject foreign judgment, enacted by a California trial court, was valid without service upon the Appellant. Finally, the lower court's *sua sponte* amendment of the subject judgment, without actual entry of the amendment by the California court, constitutes reversible error. Thus, for the foregoing reasons, the lower court's order must be vacated and judgment entered in favor of the Appellant, rendering the subject foreign judgment to be void and unenforceable.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT this computer-generated brief complies with the requirements of Fla. R. App. P. 9.210 and uses Times New Roman 14-point font, a font that is proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via facsimile and by regular U.S. mail to Brian F. Stayton, Esquire, Stayton Law Group, P.A., 4365 Lynx Paw Trail, Valrico, Fl 33596, this 25th day of April 2011.

ARDYN V. CUCHEL, ESQ.
Florida Bar No: 0713759
ARDYN V. CUCHEL, P.A.
1902 West Cass Street
Tampa, Florida 33606
Telephone: (813)258-0624
Facsimile: (813) 258-4625
COUNSEL FOR APPELANT