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IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

NEW RESIDENTIAL MORTGAGE, LLC,

Appellant,

v.

LEGACY BROKERAGE, LLC,

Appellee.

RESTRICTED APPEAL FROM THE 366TH JUDICIAL DISTRICT COURT OF COLLIN COUNTY, TEXAS; CAUSE NO. 366-01691-2022;
HONORABLE TOM NOWAK, JUDGE PRESIDING

REPLY BRIEF OF THE APPELLANT

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Collin County, Texas

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<u>**INTRODUCTION**</u>

This Court should set aside the default judgment that Appellee Legacy Brokerage, LLC (**Legacy**) improperly obtained against Appellant New Residential Mortgage, LLC (**NRM**) by serving process to CT Corporation upon a different entity. Legacy knew of its mistake; it even amended the petition to use NRM's correct name shortly after attempting to serve the previously named defendant. But Legacy failed to take the obvious next step of also amending the required service *using that same name from the amended petition*. In the face of its mistake, Legacy appeals to inapposite case law and asks this Court to draw multiple unsupported inferences in its favor, but these arguments do not allow Legacy to avoid the strict compliance standard that Texas courts uniformly enforce on plaintiffs to effect valid service.

This Court should also set aside the judgment because of a defective method of service. Texas law gave Legacy two ways to serve NRM – by delivering process in person, or by mailing the process. Instead, Legacy's process server admits to dropping the process in a box outside of CT Corporation's office. Regardless of whether CT Corporation and the process server used this method in other cases, it did not strictly comply with the requirements for a valid method of service of citation on NRM to support a default judgment against NRM. This is a separate and independent ground to vacate the default judgment.

ARGUMENT

I. There Is No Proof of Valid Service of Process Because the Citation and Return of Service Did Not Name NRM as Defendant.

A. Texas requires Legacy to demonstrate that the face of the record proves strict compliance with all aspects of service.

First, a word about the operative standards of review. Legacy's answering brief repeatedly attempts to draw inferences and create presumptions in its favor where the record is silent or ambiguous.[1] In effect, Legacy tries to shift the burdens of proof and persuasion to NRM in this appeal to require NRM to prove that it was misled or failed to ever receive the process. This is backwards.

As addressed in NRM's opening brief, when an appellant in a restricted appeal raises an argument of defective service, "strict compliance with the rules governing service of process *must affirmatively appear on the face of the record*." *Deutsche Bank, Nat'l Trust Co. v. Kingman Holdings, LLC,* No. 05-14-00855-CV, 2015 WL 6523712, at *3 (Tex. App.—Dallas Oct. 5, 2015, pet. denied) (emphasis added) (citing *Rone Eng'g Serv., Ltd. v. Culberson*, 317 S.W.3d 506, 508 (Tex. App.—Dallas 2010, no pet.)); *see also Pro-Fire & Sprinkler, LLC v. The Law Company, Inc.,* 661 S.W.3d 156, 170 (Tex. App.—Dallas 2021) ("It is well established that "a no-answer default judgment cannot stand when the defendant 'was not served in

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[1] *See, e.g.,* Appellee's Br. at 12 ("There is no indication in or out of the record …"); *id.* ("For reasons not in the record …"); *id*. ("There is no indication that…").

strict compliance with applicable requirements.'" (citing *Spanton v. Bellah*, 612 S.W.3d 314, 316 (Tex. 2020) (per curiam)). The plaintiff does not receive any presumptions that there was valid issuance, service, and return of citation. *See Primate Constr. Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam).

Importantly, NRM is not required to present evidence that it lacked all awareness of the lawsuit or even evidence that it did not receive the process papers. To the contrary, "[e]ven actual notice to a defendant is insufficient to convey jurisdiction on the trial court and will not cure defective service." *U.S. Bank Tr., N.A. v. AJ & SAL Enterprises, LLC*, No. 05-20-00346-CV, 2021 WL 1712213, at *2 (Tex. App.—Dallas Apr. 30, 2021, no pet.) (citing *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990)).

There is a reason behind "what may at first blush seem a hyper-technical rule[,]" namely "an increased opportunity for trial on the merits." *Pro-Fire*, 661 S.W.3d at 164. The Supreme Court of Texas complemented that reasoning: "we rigidly enforce rules governing service when a default judgment is rendered because the only ground supporting the judgment is that the defendant has failed to respond to the action in conformity with applicable procedure for doing so." *Hubicki v. Festina*, 226 S.W.3d 405, 408 (Tex. 2007). If, however, "the person commencing the action was guilty of comparable nonconformity with procedural rules, under a

principle of equality the derelictions offset each other and the merits of the controversy may be brought forward for consideration." *Id*.

B. The record shows that the return of service was improper because it did not match the party name.

To strictly comply with Texas law on service, the return of service and citation must match the name of the party in the petition and default judgment. *See N.C. Mut. Life Ins. Co. v. Whitworth*, 124 S.W.3d 714, 718 (Tex. App. —Austin 2003, pet. denied) ("Strict compliance requires that the name of the party listed in the return of service essentially match the name of the party named in the citation or petition."). "If the names do not match on account of even the slightest of deviations, a default judgment will be set aside." *Flores v. Sonic Auto. of Tex., L.P.*, No. 14-12-00722-CV, 2013 WL 5776077, at *3 (Tex. App.—Houston [14th Dist.] Oct. 24, 2013, pet. denied).

To repeat, NRM's name is "New Residential Mortgage, LLC." But the citation and return of service name the defendant as "New Residential Mortgage Company." CR 11, 18–19. This is consistent with the evidence presented by Legacy in support of its motion for default judgment. Attached to Legacy's supplement to its motion was an email from CT Corporation to Melissa Perez, the process server hired by Legacy. The email states that the "Entity Served" was "New Residential Mortgage Company, LLC" – not NRM. CR 34.

Under Texas precedent, this mismatch between the party name in the petition and the name of the party listed in the return of service justifies setting aside the default judgment. Two decisions from the Supreme Court of Texas are relevant. In *Uvalde Country Club v. Martin Linen Supply Co., Inc.*, the Supreme Court of Texas set aside a default judgment because "the return on its citation showed delivery to 'Henry Bunting,'" raising doubts about whether the defendant's registered agent Henry Bunting, Jr., had been served. 690 S.W.2d 884, 885 (Tex. 1985). In an earlier case, the Supreme Court of Texas overturned a default judgment on a writ of error where the defendant was named J. **W**. Hendon, but the return on the citation stated that process had been delivered to "J. **N**. Hendon." *Hendon v. Pugh*, 46 Tex. 211, 212 (1876) (emphasis added).

Only "minor discrepancies" between the citation and return of service and the defendant's true name are allowable. These include "omission of the business form (like "Inc."), insignificant words (like "at"), or an accent mark over a letter from a company name[.]" *Hercules Concrete Pumping Serv., Inc. v. Bencon Mgmt. & Gen. Contracting Corp.*, 62 S.W.3d 308, 311 (Tex. App—Houston [1st Dist.] 2001, pet. denied). Adding the word "Company" does not fit into one of the categories Texas recognizes as "minor discrepancies."

Many Texas Court of Appeals decisions have set aside default judgments because of comparable differences between the citation and/or return of service, on

the one hand, and the defendant's actual name. *Kingman Holdings, LLC,* 2015 WL 6523712, at *3 (vacating default judgment because the return of service was issued to "Deutsch Bank National Trust Company as Trustee Company," while the default judgment was entered against "Deutsche Bank, National Trust Company, as Trustee Morgan Stanley ABC Capital 1 INC, Trust 2006–NC5 Mortgage Pass Through Certificates Series 2006–NC5"); *Hercules Concrete Pumping Serv., Inc. v. Bencon Mgmt. & Gen. Contracting Corp.*, 62 S.W.3d 308, 310 (Tex. App—Houston [1st Dist.] 2001, pet. denied) (service ineffective where citation was issued to "Hercules Concrete Pumping Service, Inc." but return reflected delivery to "Hercules Concrete Pumping"); *Lytle v. Cunningham,* 261 S.W.3d 837, 840 (Tex. App.—Dallas 2008, no pet.) (holding that service was ineffective and involved more than a "slight variance" when citation was issued to "Mr. Chris Lytle" but the return said it was delivered to "Christopher Lytle"); *Brown-McKee, Inc. v. J. F. Bryan & Associates*, 522 S.W.2d 958, 959 (Tex. App.—Texarkana 1975, no writ) (setting aside default judgment because return stated that service had been made on officer of "Brown-McKee Const. Co." rather than Brown-McKee, Inc., the actual name of the defendant); *AJ and Sal Enters., LLC*, No. 05-20-00346-CV, 2021 WL 1712213, at *3 (vacating default judgment because the citation and return of service were addressed to "U.S. Bank Trust, N.A.," while the default judgment correctly named

the defendant as "U.S. Bank Trust, N.A., as Trustee for LSF8 Master Participation Trust.").

Finally, the fact Legacy went through the step of amending the petition to name NRM as defendant (CR 12–15) is clear proof Legacy was aware that there was a significant difference between "New Residential Mortgage Company, LLC" and NRM. Legacy has failed to provide any defense for its failure to ensure service of the amended petition and citation on NRM despite knowing that it needed to make the change to the defendant's name in the original petition.

The difference between "New Residential Mortgage Company, LLC," the name given in the citation and return of service, and NRM's name, which was also the name given in the amended petition and default judgment, rendered the service of process invalid. Adding "Company" into the name of the defendant is just as significant as the discrepancies relied on by Texas appellate courts to set aside many default judgments. Worse still, Legacy, in fact, amended its petition to solve for this problem, which is an acknowledgment of the significance of the discrepancy.

C. The misnomer cases cited by Legacy do not salvage the default judgment.

In its brief, Legacy hangs its hat on a collection of cases distinguishing between misidentification and misnomer in case captions. Appellee's Br. at 8–11. These cases do not provide any ground to affirm the default judgment.

First, several of the cases lack relevance because they do not concern limited appeals to set aside default judgments. One held that a judgment was enforceable notwithstanding the misnaming of the defendant, but in that case, the defendant fully participated in the action and received a copy of the judgment. *Brown v. Lanier Worldwide, Inc.*, 124 S.W.3d 883, 895 (Tex. App.—Houston [14th Dist.] 2004, no pet.). In another case, the defendant was not permitted to raise a statute of limitations defense in response to the third amended complaint, but it had been participating in the litigation for eight months despite being misnamed. *Sheldon v. Emergency Med. Consultants, I, P.A.*, 43 S.W.3d 701, 702 (Tex. App.—Fort Worth 2001, no pet.). Those opinions did not involve the procedural posture in this case and did not apply the standard of review used in a limited appeal from a no-answer default judgment.[2]

As to the cases cited by Legacy that actually involved whether to set aside a default judgment based on misnomer of the defendant, those opinions still are inapposite to this appeal. The Austin Court aptly explained the difference between those sorts of cases and cases like the present one.

> misnomer occurs when a plaintiff intends to sue the correct defendant … ; misnames him in the petition, citation, or both; describes events in the petition in such a way that the correct defendant, when he receives service thereof, is apprised of the fact that he is the intended defendant; and, most important of all, ... the intended defendant is actually served with citation.

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[2] Another case is even less similar: it involved a defendant disputing the name of the *plaintiff* after a year and a half of litigation. *Reddy P'ship/5900 N. Freeway LP v. Harris Cnty. Appraisal Dist.*, 370 S.W.3d 373, 376-77 (Tex. 2012).

Union Pac. Corp. v. Legg, 49 S.W.3d 72, 78 (Tex. App.—Austin 2001, no pet.) (citation omitted).

"The critical distinction between these misnomer cases, in which a misnamed defendant loses the case under the wrong name, and the service error cases, in which a defendant escapes a default judgment because of mistakes in the service return, appears to be in the consistency of the mistake and the demonstrated awareness by the intended defendant of the suit." *N. Carolina Mut. Life Ins. Co. v. Whitworth*, 124 S.W.3d 714, 719 (Tex. App.—Austin 2003, pet. denied). The *Whitworth* court noted, "[if] the defendant's name is consistently wrong, but *the record shows that the correct defendant is served and is not misled* by being misnamed, then the defendant must appear and plead the misnomer[.]" *Id*. (emphasis added). In *Whitworth*, the court vacated the default judgment "because the name of the company on the return is missing a word that is in appellant's name in the petition and the citation." *Id*. at 720. Specifically, the return of service omitted "Life" from the appellant's name (North Carolina Mutual Life Insurance Company). *Id*.

This Court should look to *Whitworth*, which recognized that "the law considers the omission of a meaningful word from appellant's name on the return of service to be more than a minute detail." *Id*. at 722. The *addition* "of a meaningful word" (here, "Company") is equally "more than a minute detail" that prevents a finding of strict compliance.

Drilling down into the details of the misnomer cases cited by Legacy involving default judgments, it is clear that they are relevantly dissimilar from the present appeal. One concerned an action by a Michael Booker to set aside a default judgment on the ground that the service of process had misspelled his first name as "Micheal." *Booker v. LVNV Funding LLC*, No. 13-16-00035-CV, 2017 WL 2118781, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 2, 2017, no pet.). The court rejected his argument, holding, "a variant spelling of a name in a document will not render the document void if the misspelling is pronounced in the same way as the true spelling." *Id*., at *4. Similarly, a Christina Marie Giles was denied her appeal of default judgment when the only error was that the process papers that misspelled her first name as "Christin**e**." *Giles v. Giles*, No. 01-20-00571-CV, 2022 WL 2251814, at *4 (Tex. App.—Houston [1st Dist.] June 23, 2022, no pet.). This case, of course, does not involve mere misspellings.

The third case involved an Elsie Deszo who ran several businesses with "Judi" in the name and had been served with process addressed to "Judi Deszo." *Dezso v. Harwood*, 926 S.W.2d 371, 374 (Tex. App.—Austin 1996, writ denied). The court declined to set aside the default judgment, holding "the allegations in the petition" and her admission that "a lot of people will call me Judi because ... they think it is my name" meant she "should have logically concluded that [plaintiff] intended to

sue her and that he had simply misnamed her." *Id*. That unique set of facts is also, of course, not analogous to the present case.

Each of those cases on which Legacy relies concerns a record showing that despite some misspelling of the defendant's name in the process papers, the correct defendant was actually served with process and understood that he or she was the intended defendant. In this case, however, there is no such evidence. The record does not show that NRM ever received the process papers or that NRM understood that it was the intended defendant in this suit. Nor does the record shed light on the identity of "New Residential Mortgage Company, LLC," if such an entity even exists, and its legal relationship, if any, to NRM. *Cf. Legg*, 49 S.W. 3d at 78 (rejecting argument that service on "Union Pacific Railroad" was valid service of Union Pacific Corporation because, among other issues, the petition did not suggest that both were "one and the same, or that the latter is a trade name employed by the former.").[3] Therefore, this Court cannot decide this present appeal under the misnomer cases cited by Legacy.

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[3] On this point, Legacy asserts "There is no indication in or out of the record that there is another company called 'New Residential' that has the suffix, 'Company.'" Appellee's Br. at 12. However, Legacy, as the party defending the default judgment, bears the burden on this issue. This includes not only alleging, but proving, that there is no entity with "New Residential" and "Company" in the title. Furthermore, this Court will not rely on Legacy's allegation about matters outside the record; Legacy is obliged to point to record evidence. *See, e.g., Kingman Holdings* 2015 WL 6523712, at *3 ("strict compliance with the rules governing service of process *must affirmatively appear on the face of the record*.") (emphasis added).

D. The fact that CT Corporation received service of process does not mean NRM was properly served.

Even if CT Corporation picked up the citation that Legacy's process server supposedly left in the drop box, CR. 33–34, that does not mean that *NRM* actually received the service. Legacy appears to assume that regardless of the errors in the defendant's name set out in the citation, the mere fact that the citation was served on the registered agent of the defendant is sufficient to effect valid service. *See* Appellee's Br. at 8.

Another Texas appellate court has held, "even when a return establishes that the person served was an agent for service of process, the return is still defective if it does not establish that the corporation was served by reciting that the corporation was served by serving or through the agent." *Benefit Planners, L.L.P. v. RenCare, Ltd.*, 81 S.W.3d 855, 859 (Tex. App.—San Antonio 2002, pet. denied). In this case, the return of service states that it was served "by delivering to Defendant, by delivering to Defendant's Registered Agent, by delivering to the Registered Agent's Employee, in person, at Defendant's Registered Office." CR 18. However, "Defendant" in the return of service is given as "New Residential Mortgage Company, LLC." CR 18. Thus, the return of service does not show on its face that the delivery to CT Corporation effected service of process on NRM.

Additionally, Legacy's argument is weakened by the fact that CT Corporation is the registered agent for entities other than NRM. This is reflected in the process

server's statement,[4] "CT Corporation is a registered agent that accepts service for **many companies**." CR 33 (emphasis added). The process server further testified that CT Corporation has a set of employees to receive and pass on service to their clients, but she did not give any basis to conclude that any employee or automated process passed on the process papers to NRM. CR 33. The mere fact that service of process directed to "New Residential Mortgage Company, LLC" made it into the hands of CT Corporation does not mean it was properly served on NRM.

The record here demonstrates only that a CT Corporation employee acknowledged the drop-off of process made out to "New Residential Mortgage Company, LLC," not that it was then routed to NRM. To reiterate the standard of review, on a limited appeal this Court does not make inferences in favor of service, not "even the most obvious and rational inferences." *Benefit Planners, L.L.P. v. RenCare, Ltd.*, 81 S.W.3d 855, 861 (Tex. App.—San Antonio 2002, pet. denied). To salvage the default judgment, the record must unambiguously show Legacy's service of process to CT Corporation directed to some purported entity other than NRM was still sufficient to reach NRM *and* that NRM understood that it was the intended defendant in the suit. This Court cannot draw any inferences or deductions in favor

[4] As discussed below in Section II, the process server's statement was unsworn, unnotarized, and not made under penalty of perjury, and so was not competent and admissible evidence.

of Legacy as to the validity of service, and so Legacy is unable to make a case for upholding the default judgment.

II. The Record Does Not Show Legacy's Process Server Used a Legally Valid Method to Serve Process.

The second ground for this Court to set aside the default judgment is Legacy's violation of Tex. R. Civ. P. 106. That rule authorizes only two service methods – in-person delivery or mail – unless a plaintiff obtains a court order permitting an alternative form of service. The parties' disputes on the method of service are narrow. It is undisputed that Legacy did not use the mail method of service. It is also undisputed that Legacy did not seek and receive an order permitting to make service by an alternative means, as provided for in Tex. R. Civ. P. 106(b). The only dispute is whether the drop-box method that Legacy's process server used to deliver the citation to CT Corporation was "in-person" service under Tex. R. Civ. P. 106(a)(1).

In the opening brief, pp. 18–19, NRM pointed out that leaving process papers in a box and sending an email to the registered agent is not in-person service, which this Court has previously defined as "service by hand delivery." *Pro-Fire & Sprinkler, LLC,* 661 S.W.3d at 17; *accord Cervantes v. Cervantes*, No. 03-07-00381-CV, 2009 WL 3682637, at *3 (Tex. App.—Austin Nov. 5, 2009, no pet.) (treating "hand delivery" as synonymous for in-person service under Rule 106). In response, Legacy merely cites inapposite cases where the defendant "physically refused" process papers from the server, and the court held it sufficient that the documents

were then deposited in the defendant's house. Appellee's Br. at 14–15. Obviously, this is not a case where NRM refused delivery.

Nor does the record contain sufficient information about the drop-box method for this Court to be assured that it was functionally equivalent in-person service. The return of service recites that the method of service was "by delivering to Defendant, by delivering to Defendant's Registered Agent, by delivering to the Registered Agent's Employee, in person, at Defendant's Registered Office." CR 18. Legacy also submitted an unsworn "report" from process server Melissa Perez states that "now [CT Corporation] ha[s] a box you can leave the documents in." CR 33. As a threshold matter, this report should not be considered admissible evidence because it did not include a statement that it was made under penalty of perjury. *See* Tex. Civ. Prac. & Rem. Code § 132.001(c) (an unsworn declaration "must be .. subscribed by the person making the declaration as true under penalty of perjury."); see also *Tex. Dep't of Pub. Safety v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012) (emphasizing that statements in unsworn declaration are "subscribed" as true under penalty of perjury and thus "[t]he **verity of a declaration is ... assured by the criminal penalties for perjury**" (emphasis added)).

Aside from its inadmissibility, Ms. Perez's report does not state that Ms. Perez observed a CT Corporation employee take the process papers out of the box, or otherwise provide evidence to be assured that CT Corporation got the documents.

Thus, even if it were admissible, the report does not show that Ms. Perez's delivery of the process papers in this case was functionally equivalent to in-person delivery.

Finally, the COVID-19 angle pressed by Legacy rings hollow. The Supreme Court of Texas revised Rule 106 in December of 2020 to permit trial courts to allow additional methods of service, including by electronic methods, if in-person or mail service could not be accomplished. Undoubtedly, the Supreme Court of Texas was aware at this time of any difficulties the COVID-19 pandemic caused for service of process. Had the Court wanted, it could have made a temporary exception or long-term change to service rules that would allow for the drop-box method the process server described.

Legacy's unauthorized version of service happened in April 2022, over two years after the start of the COVID-19 pandemic. Had it been April *2020*, a novel service method without precedent under Texas rules and centuries of practice would be more understandable – perhaps even excusable. But in April of 2022, Legacy could certainly have followed one of the two service methods authorized by Rule 106: mail or hand-delivery. Whatever the reason for the choice to employ the drop-box method may be, the record does not permit the conclusion that Legacy strictly complied with Rule 106.

III. The Trial Court Erred by Granting Relief Beyond the Scope of the Petition.

The third and final reversible error lies in the scope of the trial court's final judgment. As addressed in the opening brief, pp. 20–23, the trial court decreed that NRM "owns no interest whatsoever in and to the property" (CR 38), which went beyond what Legacy sought in the amended petition: an order declaring Legacy's title "free and clear of the deed of trust" (CR 10). Specifically, the trial court's decree appears to deny NRM any equitable liens or other interests it could claim, in addition to declaring the deed of trust void.

In its brief, Legacy merely feigns confusion about the possibility that NRM could have interests in the property other than the recorded deed of trust. Appellee's Br. at 16–18. NRM trusts that this Court will understand the problem here, and for the sake of judicial economy will not repeat what it sufficiently laid out in the opening brief. In the event that this Court does not wholly vacate the default judgment for the reasons stated in Sections I and II, it should limit the scope of the default judgment to the relief sought in the original petition: only an order concerning the deed of trust.

CONCLUSION

For the reasons given above, this Court should vacate the default judgment and remand for further proceedings on the merits.

Respectfully submitted this 27th day of September, 2023.

/s/ *Gabriella Alonso*

Counsel for Appellant

CERTIFICATE OF SERVICE

I, Gabriella Alonso, Appellant New Residential Mortgage, LLC, certify that, on the 27th day of September, 2023, the attached Reply Brief was filed electronically through the appellate CM/ECF system with the Clerk of the Court, which will send notification of such filing to all counsel of record.

/s/ *Gabriella Alonso*
Of Counsel

CERTIFICATE OF COMPLIANCE

I, Gabriella Alonso, counsel for Appellant New Residential Mortgage, LLC, certify, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2) and 9.4(i)(3), that the attached Reply Brief, is proportionally spaced, has a typeface of 14 points or more, and contains 4,066 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

September 27, 2023

/s/ *Gabriella Alonso*
Of Counsel

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