

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.: 17-1604
TRIAL COURT CASE NO.: 16-025189 CA

LUIZ QUEIROZ, KARINE QUEIROZ, and SOHO BAY RESTAURANT, LLC

Appellants,

vs.

BENTLEY BAY RETAIL LLC

Appellee.

Appellants' Initial Brief

Appeal of Orders Denying Motion to Quash Service and Entering Sanctions

FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR MIAMI-DADE COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

This appeal is about upholding the non-resident witness immunity rule and preventing a chilling effect on non-resident attendance at Florida depositions and other proceedings. The Appellants are Brazilian corporate officers Luiz Queiroz and Karine Queiroz, who ask this Court to uphold their immunity and quash service made while they attended Appellee's depositions of Soho Bay officers.

This case began when Appellee sued four defendants: (1) Soho Bay Restaurant; (2) Katz Barron; (3) Luiz Queiroz; and (4) Karine Queiroz.¹ Appellee sued Soho Bay in Count I for breach of a lease; Luiz Queiroz and Karine Queiroz in Count II for breach of a distinct guarantee contract; and Katz Barron and Soho Bay in Count III for declaratory relief as to a construction escrow deposit.² Each cause of action had its own distinct set of defendants and its own distinct contract.

Appellee served Soho Bay with a summons upon manager Max Heindl.³ Appellee failed to serve Luiz Queiroz or Karine Queiroz with summonses as to Count II for breach of guarantee, making no attempts to serve either person at their residences in Brazil.⁴ Appellee sought to have Luiz Queiroz and Karine Queiroz each appear in the U.S. for corporate officer depositions as officers of Soho Bay.⁵

¹ App. 9 at ¶¶ 44–78 (Amended Complaint); App. 3 at ¶¶ 13–16.

² App. 9 at ¶¶ 44–78.

³ App. 102.

⁴ App. 103–05.

⁵ App. 98–101 (notices for deposition of Luiz Queiroz and Karine Queiroz).

The trial court ordered that they “appear for deposition **in their corporate capacity.**”⁶ Appellee confirmed in open court: “**this has nothing to do with the individual claims against these defendants.**”⁷

At the May 19, 2017 corporate officer witness depositions as to Counts I and III against Soho Bay only, Appellee served officers Luiz Queiroz and Karine Queiroz with individual summonses as to Count II against them personally.⁸ Luiz Queiroz and Karine Queiroz filed a joint motion to quash service of process under the non-resident witness immunity rule.⁹ On June 21, 2017, the trial court denied the their motion to quash.¹⁰ The trial court also sanctioned Luiz Queiroz and Karine Queiroz because Karine Queiroz had stated that travel to the U.S. for depositions under these specific circumstances was unduly burdensome.¹¹ Luiz Queiroz and Karine Queiroz, along with Soho Bay, appealed.

SUMMARY OF ARGUMENT

Under well-established Florida law, non-resident corporate officers are immune from service of process on claims against them personally while at corporate officer depositions; this is the non-resident witness immunity rule.

⁶ App. 131 (emphasis added); App. 111–130; *see also* App. 128 at TR. 18, ln. 16–TR. 19, ln. 5–7 (The Court: “**Only in their capacity as officers.**”).

⁷ App. 125 at TR. 15, ln. 25–TR. 16, ln. 3 (emphasis added).

⁸ App. 558–62.

⁹ App. 357.

¹⁰ App. 732 at TR. 57, ln. 25–TR. 58, ln. 3.

¹¹ App. 736 (the trial court did not state any legal basis for sanctions).

Murphy & Jordan, Inc., v. Ins. Co. of N. Am., 278 So. 2d 296, 297 (Fla. 3d DCA 1973) (holding where co-defendants/non-residents were deposed as corporate officers of co-defendant corporation, they were immune from process on personal claims in same case, as identity of parties was lacking).

The purpose of this rule is to prevent a chilling effect on non-resident attendance at depositions and other proceedings, and to incentivize voluntary attendance of these proceedings by non-residents. *Lee v. Stevens of Fla., Inc.*, 578 So. 2d 867, 868 (Fla. 2d DCA 1991) (policy of the rule); *Munsell v. Blutworth*, 474 So. 2d 1286, 1288 (Fla. 4th DCA 1985) (policy of the rule); *Cordoba v. Cordoba*, 393 So. 2d 589, 591 (Fla. 4th DCA 1981) (policy of the rule).

Here, the Appellee lured non-resident Brazilian corporate officers Luiz Queiroz and Karine Queiroz to Coral Gables for service of process on personal claims, by noticing their corporate officer depositions for Soho Bay on distinct claims. Under the non-resident witness immunity rule, these Brazilian officers were immune from service at the corporate officer witness depositions. Thus, this Court should reverse the June 21, 2017 orders denying motion to quash Appellee's service, and remand with instructions to quash process and service of process.

STANDARD OF REVIEW

De novo review applies to these questions of jurisdiction and law. *Mecca Multimedia, Inc. v. Kurzbard*, 954 So. 2d 1179, 1181 (Fla. 3d DCA 2007).

ARGUMENTS

I. The Brazilian Queiroz officers were immune from service of process on claims against them personally when attending officer depositions in their corporate capacity only.

The Florida Supreme Court long ago established the rule that non-residents who come into this jurisdiction to attend proceedings as parties or witnesses, or in some other capacity related to the necessities of pending litigation, are immune from service of process during the period of their attendance. *Bruner v. Robins*, 191 So. 2d 567, 568 (Fla. 3d DCA 1966) (citing *Rorick v. Chancey*, 195 So. 418, 425 (Fla. 1938)); *Higgins v. Garcia*, 522 So. 2d 95, 96 (Fla. 3d DCA 1988) (holding where non-resident corporate officer was deposed as corporate rep and not as an individual, officer was immune from process while attending deposition).

The only *exception* to this immunity occurs when there is both identity of the parties and identity of the issues and causes of action between the matter in attendance and the matter served. *Cordoba*, 393 So. 2d at 590 (citing *Lienard v. DeWitt*, 153 So. 2d 302 (Fla. 1963)). Because Florida law governing service of process must be strictly construed and enforced, so too must the *exception* to the non-resident witness immunity rule. *See Shurman v. Atlantic Mortg. & Inv. Corp.*, 795 So. 2d 952, 954 (Fla. 2001) (holding inmate's "usual place of abode" for service of process was prison, not home where he had lived with his wife, and thus substitute service through wife must be quashed); *Stettner v. Richardson*, 143 So.

3d 987, 990 (Fla. 3d DCA 2014) (“Statutes governing substitute service of process must be strictly complied with, and such provisions are to be strictly construed.”).

When analyzing this immunity *exception*, identity of parties means that the person must have appeared for deposition/examination in the exact same name and capacity as that for which he is then served with new process. *Murphy & Jordan*, 278 So. 2d at 297. Thus, there is no identity of parties if a witness appears in his corporate capacity but is served in his individual capacity. *Id.*

Identity of issues means that the person must have appeared for deposition/examination on the exact same issue, cause of action, and subject matter as that for which he is then served process. *Francini v. Int’l Marble Trades, Inc.*, 546 So. 2d 777, 778 (Fla. 3d DCA 1989). Thus, there is no identity of issues if a witness appears to testify on his corporation’s failure to pay a debt (one cause of action), but is served on a derivative claim against him personally for failure to pay the same debt (a distinct cause of action). *Id.* at 777–78. There is no identity of issues *even when* claims are “incidental to or correlated with the pending action against [a] corporation.” *Id.* Given the rarity of complete identity, the *exception* to immunity “is strictly limited.” *Munsell* at 1287.

The policy and purpose of this rule and the strict limitation on its exception is to avoid deterring witnesses or parties from coming forward for fear of being served with process on new claims or in different capacities. *Munsell* at 1288;

Cordoba, 393 So. 2d at 591; *Lee v. Stevens*, 578 So. 2d at 868. Any application of the immunity rule and its strictly limited exception should be made in accordance with this policy and purpose. *Id.*

Here, the Appellee improperly served summonses upon non-resident corporate officers Luiz Queiroz and Karine Queiroz for claims against them personally (Count II) while they were attending corporate officer depositions in their corporate capacity only (Counts I and III).¹² The underlying contracts, parties, roles, and causes of action were different between those in deposition and those for which summonses were served at deposition.¹³ Thus, there was no identity of parties and no identity of causes of action. Both Luiz Queiroz and Karine Queiroz were immune from service and the trial court had to quash service. Nevertheless, the trial court denied their motion to quash and sanctioned them. Thus, this Court should reverse the June 21st orders and remand with directions to quash service.

- a. This Court’s decision in *Murphy & Jordan* is factually on-point, controlling, and dispositive that the Queirozes were immune from service, given lack of identity of parties.**

This Court’s *per curiam* decision in *Murphy & Jordan, Inc., v. Insurance Company of North America*, 278 So. 2d 296 (Fla. 3d DCA 1973), is factually on-point, controlling, and dispositive that the services on Luiz Queiroz and Karine Queiroz should be quashed. The facts in *Murphy & Jordan* are the same as here:

¹² App. 558–62.

¹³ App. 1.

There (<i>Murphy & Jordan</i>)	Here (<i>Luiz Queiroz & Karine Queiroz</i>)
<p>Appellee filed a complaint against a Florida company (Murphy & Jordan, Inc. of Florida) and its non-resident owners and corporate officers individually (William Murphy and Thomas Jordan).</p>	<p>Appellee has filed a complaint against a Florida company (Soho Bay) and its non-resident owners and corporate officers individually (Luiz Queiroz and Karine Queiroz).</p>
<p>(<i>Murphy</i> at 296).</p>	<p>(App. 1).</p>
<p>William Murphy was a resident of New Jersey and Thomas Jordan was a resident of New York.</p>	<p>Luiz Queiroz is a resident of Salvador, Brazil, and Karine Queiroz is a resident of Salvador, Brazil.</p>
<p>(<i>Murphy</i> at 297).</p>	<p>(App. 365 at n. 31).</p>
<p>Appellee did not serve Murphy or Jordan individually with summonses at their residences.</p>	<p>Appellee did not serve Luiz Queiroz or Karine Queiroz individually with summonses at their residences.</p>
<p>(<i>Murphy</i> at 296).</p>	<p>(App. 103–05).</p>
<p>Appellee was able to serve process on the Florida company (M&J of Fla.) by serving its agent with a summons.</p>	<p>Appellee was able to serve process on the Florida company (Soho Bay), by serving its agent with a summons.</p>
<p>(<i>Murphy</i> at 296).</p>	<p>(App. 102).</p>
<p>Appellee then served notices of deposition to the Florida company (M&J of Fla.) to take the corporate officer depositions of Jordan as president and Murphy as secretary, in their corporate capacity only.</p>	<p>Appellee then served notices of deposition to the Florida company (Soho Bay), to take the corporate officer depositions of Luiz Queiroz and Karine Queiroz, in their corporate capacity only.</p>
<p>(<i>Murphy</i> at 296).</p>	<p>(App. 98–101 and App. 357 at n. 32)</p>

When Murphy and Jordan arrived in Florida for their corporate officer depositions, Appellee served them with summonses in their individual capacities on personal claims that were different causes of action in that same lawsuit.

(*Murphy* at 296).

When Luiz Queiroz and Karine Queiroz arrived in Florida for their corporate officer depositions, Appellee served them with summonses in their individual capacities on personal claims that were different causes of action in this same lawsuit.

(App. 558–62).

Given that the facts and posture here are the same as those in *Murphy & Jordan*, the result in *Murphy & Jordan* is dispositive and should apply here. This Court previously reversed the trial court’s denial of a motion to quash service on corporate officers at a co-defendant corporate deposition, and remanded with directions to quash service. *Id.* at 297. The same should apply here. Thus, both Luiz Queiroz and Karine Queiroz were immune and this Court should reverse the June 21st orders with instructions to quash process and service of process.

b. Immunity under *Murphy & Jordan* is well supported by other decisions confirming the Queirozes had immunity from individual process at the May 19th corporate officer depositions.

This Court’s decision in *Murphy & Jordan* is well supported by other decisions providing immunity under various circumstances. *See In re Marriage of Gonzalez*, 584 So. 2d 179, 180 (Fla. 3d DCA 1991) (non-resident officer immunity); *Francini v. Int’l Marble Trades, Inc.*, 546 So. 2d 777, 777–78 (Fla. 3d DCA 1989) (London officer immunity); *Higgins v. Garcia*, 522 So. 2d 95, 96 (Fla. 3d DCA 1988) (officer immunity); *Pomerantz v. Hollowell*, 502 So. 2d 1314, 1314

(Fla. 3d DCA 1987) (Georgian immunity); *Mallin v. Sunshine Kitchens, Inc.*, 314 So. 2d 203, 204 (Fla. 3d DCA 1975) (immunity at settlement conference); *Lawson v. Benson*, 136 So. 2d 353, 353 (Fla. 3d DCA 1962) (immunity on fees claim).¹⁴

These decisions show that the immunity rule applies across any circumstance or proceeding unless plaintiff shows there is complete identity of parties and causes of action to obtain the strictly construed exception. Here, there is no identity of parties and causes to satisfy the strict exception, and immunity applies to Luiz Queiroz and Karine Queiroz. *Id.* Thus, this Court should reverse the June 21st orders and remand with instructions to quash process and service.

c. Immunity should be upheld here to preserve the policy and purpose of the immunity rule, to prevent the chilling effect on non-resident depositions and faith in the trial courts.

The policy and purpose of the non-resident witness immunity rule is to avoid deterring witnesses or parties from coming forward for fear of being served with process on new claims or in different capacities. *Munsell* at 1288; *Cordoba*, 393 So. 2d at 591; *Lee v. Stevens*, 578 So. 2d at 868. *Id.* In light of this policy, the *exception* to immunity “is strictly limited.” *Munsell* at 1287.

Here, the trial court’s denial of Luiz Queiroz and Karine Queirozes’ motion to quash runs afoul of the policy of the non-resident witness immunity rule and the

¹⁴ See also *Cordoba v. Cordoba*, 393 So. 2d 589, 590–92 (Fla. 4th DCA 1981) (immunity on Count I after appearing on Count II/IV); *Keveloh v. Carter*, 699 So. 2d 285, 288 (Fla. 5th DCA 1997 (Illinois resident immunity); *Lee v. Stevens of Fla., Inc.*, 578 So. 2d 867, 868 (Fla. 2d DCA 1991) (Canadian resident immunity)

policy of strict interpretation and enforcement as to any service of process issue. This type of harsh entry into the U.S. justice system is unreasonable and fearsome. Should any other corporate witnesses hear tell of this, they will likely avoid coming here in any capacity for any proceeding. This is bad precedent and a bad message to send to non-resident witnesses. This is the specific result the immunity rule was designed to avoid. Thus, this Court should reverse the June 21, 2017 orders and remand to quash process and service of process.

CONCLUSION

The service of summonses upon Luiz Queiroz and Karine Queiroz at corporate officer witness depositions, for distinct claims against them personally, was invalid under the non-resident witness immunity rule, its policy, and the rule of strict scrutiny as to service of process. The trial court's June 21, 2017 orders denying Luiz Queiroz and Karine Queiroz's motion to quash and entering sanctions should thus be reversed and remanded with instructions to quash process and service of process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that, in accordance with Fla. R. Jud. Admin. 2.516, a copy of this notice was served by email and U.S. mail on July 17, 2017, to: Javier A. Lopez, Esq., 2525 Ponce de Leon Blvd., Ste. 900, Coral Gables, FL 33134, jal@kttlaw.com

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing document is in compliance with the Rule's font requirements [Times New Roman 14].