

September 13, 2011

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## ***Florez v. State:*** Recent amendment to CPA may impact default judgments in asset forfeiture cases

Case Nos. A11A0929, A11A0930 (Ga.App. Aug. 11, 2011)

In *Florez*, the State brought a RICO civil in rem forfeiture action against certain individuals and corporations. The complaint was filed on July 8, 2010. Service on all defendants was made on July 15, 2010. Each proof of service was filed in the Superior Court Clerk's Office on July 26. The State obtained a default judgment on September 1, 2010. The defendants appealed from the default judgment.

The State argued that the default judgment was timely. It argued that the defendants had thirty days, or until August 14, to file an answer to the complaint. Then, under the default judgment statute, OCGA § 9-11-55, the defendants had an additional 15 days as a matter of right to open the default upon filing an answer with meritorious defenses and paying court costs. Since none of the defendants did so by August 29, the State properly took default judgments against them on September 1.

The Court disagreed. It noted that OCGA § 9-11-4(h) governing the return of proof of process was amended, effective July 1, 2010. It now provides as follows: "The person serving the process shall make proof of such service with the court in the county in which the action is pending within five business days of the service date. **If the proof of service is not filed within five business days, the time for the party served to answer the process shall not begin to run until such proof of service is filed.**" (Emphasis supplied). Here, the returns were not filed until July 26, which was more than five days from the date of service. Therefore, the time for answering the complaint did not begin to run until July 26 and accordingly, the defendants were entitled as a matter of right to open default until September 9, 2010. The judgments having been entered prematurely on September 1, the Court reversed and remanded to the trial court.

Does OCGA § 9-11-4(h), as amended, apply to civil in rem forfeitures under OCGA § 16-13-49(o)? The answer appears to be yes and no. Personal service is specifically provided under subsection (o) to be accomplished through the procedures stated in § 9-11-4(e). OCGA § 16-13-49(o)(2)(A). The CPA relating to default judgment procedures apply in drug forfeiture proceedings under subsection (o). *Ford v. State of Georgia*, 271 Ga. 162 (1996). Therefore, § 9-11-4(h), governing the return of proof of personal service under § 9-11-4(e) should control the time in which the clock begins to run for answering the complaint.

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The same does not appear to hold true for service made by publication under OCGA § 16-13-49(o). OCGA § 16-13-49(o)(2)(A) specifically provides that “[s]ervice of the complaint and summons shall be as provided in subsections (a), (b), (c), and (e) of Code Section 9-11-4.” Since service by publication is governed by subsection (f)(1) of § 9-11-4, it would appear that the legislature deliberately excluded such requirements in subsection (o) proceedings. Moreover, the procedure for service by publication is specifically addressed in OCGA § 16-13-49(o)(2)(B). Accordingly, if the rules regarding publication under § 9-11-4(f) do not apply in subsection (o) proceedings, the recently amended provisions regarding return of service, even if it contains a publication return of service component, should not apply as well.

Furthermore, § 9-11-4(h) should not have an effect on non-judicial proceedings under OCGA § 16-13-49(n). First, subsection (n) does not require personal service under § 9-11-4(e) of the notice of seizure. Second, even if a known owner or interest holder is personally served with the notice of seizure, the time for serving a claim begins to run from the date of the second publication of the notice of seizure, not the date of personal service. OCGA § 16-13-49(n)(3). See *Weaver v. State of Georgia*, 299 Ga.App. 718 (2009)(It is the date of second publication, not the date upon which claimant was served by certified mail, which begins the running of time to assert a claim). Also, the rules governing publication of the notice of seizure are specifically provided under subsection (n) and the legislature did not provide that publication be accomplished through the mechanism established in § 9-11-4(f)(1). Thus, the rules governing return of proof of service by publication under § 9-11-4(h) should not apply.