2014 WL 6386901 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

State of FLORIDA, Plaintiff,
v.
Richard SMITH, Defendant.

No. F14-18752.
November 13, 2014.

Order

Miguel M. de la O, Judge.

***1** SECTION 15

THIS CAUSE came before the Court on the Surety, Big Angel Bail Bonds' ("Surety"), Motion to Set Aside Estreature and Discharge Surety ("Motion"). The Court has reviewed the Motion, heard argument of counsel, and is fully advised in the premises. The Motion to Set Aside the Estreature is granted. The Motion to Discharge the Surety is denied.

I. BACKGROUND.

The Surety issued a bond for the Defendant in this cause, Richard Smith ("Smith"). Smith failed to appear before the Court on September 17, 2014. The Court issued an Alias Capias for Smith and forfeited the Surety's bond.

The Surety proffers [1] to this Court that it has expended substantial resources in its effort to locate and apprehend Smith. The Surety claims that it cannot secure the return of Smith to this jurisdiction because the State Attorney's Office ("State") has not certified in the *alias capias* that it will extradite Smith. The Surety claims that without such certification, local authorities in Texas (where Smith presumably resides at this time) will not detain Smith.

The Surety asks this Court to discharge the forfeiture as a result of the State's refusal to extradite Smith and because it did not receive notice of Smith's obligation to appear in court.

II. FLORIDA'S BAIL STATUTE DOES NOT ALLOW FOR THE DISCHARGE OF THE FORFEITURE WHERE THE STATE REFUSES TO EXTRADITE.

Florida's law on bail is set forth in Chapter 903. Unless there is an ambiguity in the bail statute, this Court must look only to the text of Chapter 903 in determining whether it can discharge the forfeiture in this matter.

"The intent of the Legislature is the polestar of statutory construction. To discern this intent, the Court looks primarily to the plain text of the relevant statute, and when the text is unambiguous, our inquiry is at an end." *E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009). "A court's function is to interpret statutes as they are written and give effect to each word in the statute." *Florida Dept. of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). It is a fundamental principle of statutory construction that all words and sections of a statute must be given meaning. *See Sch. Bd. of Palm Beach County v. Survivors*

Charter Sch., Inc., 3 So. 3d 1220, 1233 (Fla. 2009) ("Basic to our examination of statutes, … is the elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

Chapter 903 is clear that this Court may only discharge a bond forfeiture within 60 days of the forfeiture for one of three reasons: (1) "it was impossible for the defendant to appear as required due to circumstances beyond the defendant's control"; (2) "at the time of the required appearance, the defendant was adjudicated insane and confined in an institution or hospital or was confined in a jail or prison"; or (3) "surrender or arrest of the defendant if the delay has not thwarted the proper prosecution of the defendant." § 903.26(5), Fla. Stat. (2013). There are *no other grounds* upon which this Court can discharge a forfeiture. *See* § 903.26(6), Fla. Stat. (2013) ("The discharge of a forfeiture shall not be ordered for any reason other than as specified herein.").

***2** The Surety's Motion is denied on these grounds because it does not fall within one of the three limited grounds upon which this Court can order a discharge of a forfeiture. As Justice Oliver Wendell Holmes said over a century ago, "[w]hatever the consequences, we must accept the plain meaning of plain words." *United States v. Brown*, 206 U.S. 240, 244 (1907).

There are no principles of equity that apply here. In *Leon County v. Aloi-Williams Bonding Agency*, the First DCA rejected application of equitable principles because the Legislature had already addressed the factors which the surety raised in equity. 652 So. 2d 464, 466 (Fla. 1st DCA 1995). Likewise, the Legislature has addressed the Surety's argument here by allowing remission where "the surety has substantially attempted to procure or cause the apprehension or surrender of the defendant." § 903.28, Fla. Stat. (2013).
Chapter 903 is clear that the forfeiture must be paid or discharged within [sixty] days. *See id.* §§ 903.26(2)(a),(b), 903.27(1). This strict deadline is ameliorated, however, by the remission statute, section 903.28. Section 903.28 "establishes a method that the bondsman can use to receive what is in effect a two-year extension of time to surrender the defendant if the bondsman pays the forfeiture prior to the entry of final judgment." Thomas W. Logue & William X. Candela, *Florida Law of Bail Bond Estreature*, Fla. B.J., Feb. 1989, at 44, 45.

County Bonding Agency v. State, 724 So. 2d 131, 132 (Fla. 3d DCA 1998). Consequently, the Surety's remedy, if any, is to seek remission after it pays the forfeiture. The Court's conclusion is strengthened by the fact that all the cases relied on by the Surety address remission of forfeiture under section 903.28 and *not* discharge under section 903.26. *See* Motion at 3.

The Surety's attempt to avail itself of precedent which provides that Chapter 903 should be "liberally construed" is misplaced. *See Bd. of Comm. of Brevard v. Barber Bonding Agency*, 860 So. 2d 10, 12 (Fla. 5th DCA 2003). If the statute was unclear, or a situation arose which was not covered by the statutory provisions, then this Court would be required to interpret the statute liberally in favor of ensuring sureties are motivated to post bonds.

The statutory scheme enacted by the Legislature is clear. If the Surety believes that the State Attorney's policy of not seeking extradition of certain felonies should be the basis for discharging forfeitures, it needs to address the matter to the Florida Legislature.

III. THE FORFEITURE MUST BE SET ASIDE BECAUSE THE SURETY DID NOT RECEIVE ACTUAL NOTICE OF THE DEFENDANT'S OBLIGATION TO APPEAR IN COURT, BUT THE SURETY IS NOT DISCHARGED BECAUSE IT HAS NOT SHOWN PREJUDICE FROM THE LACK OF NOTICE.

The Surety argues that the Court should set aside the forfeiture and discharge the Surety because it did not receive actual notice of Smith's obligation to appear before the Court pursuant to section 903.26(1)(b). The facts are clear on this point. The Clerk's Office mailed notice to the Surety at its listed place of business. The Surety did not receive the notice because the U.S. Postal Service, for reasons unknown to the parties and this Court, declared the notice was undeliverable and placed a yellow sticker on the returned envelope reading:

RETURN TO SENDER

INSUFFICIENT ADDRESS

UNABLE TO FORWARD

***3** The question presented to this Court is whether the Clerk's Office complied with section 903.26(1)(b) when it mailed a notice to the Surety, but which the Surety -- through no fault of either the Clerk or the Surety -- did not actually receive.

Generally,

> proof of mailing [ ] raises a rebuttable presumption that mail was received, *Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973); *Scutieri v. Miller*, 584 So. 2d 15, 16 (Fla. 3d DCA 1991); *World on Wheels, Inc. v. International Auto Motors, Inc.*, 569 So. 2d 836, 837 n.1 (Fla. 3d DCA 1990); *Berwick v. Prudential Property & Cas. Ins. Co.*, 436 So. 2d 239, 240 (Fla. 3d DCA 1983); *Scott v. Johnson*, 386 So. 2d 67, 69 (Fla. 3d DCA 1980).

Star Lakes Estates Ass'n, Inc. v. Auerbach, 656 So. 2d 271, 274 (Fla. 3d DCA 1995). *Accord Burt v. Hudson & Keyse, LLC*, 138 So. 3d 1193, 1195 (Fla. 5th DCA 2014) ("Generally, proof of mailing creates a rebuttable presumption of receipt."). "It follows, by another equally broad presumption, that mail properly addressed, stamped, and mailed was received by the addressee (31A C.J.S. Evidence s 136a), and proof of general office practice satisfies the requirement of showing due mailing. 31A C.J.S. Evidence s 136c(1)." *Brown v. Giffen Indus., Inc.*, 281 So. 2d 897, 900 (Fla. 1973).

However, if the intended recipient raises a factual dispute about whether the mailing was received, the trial court must make a finding of fact.

> The certificate of service on the subject order was *prima facie* proof that the said order was mailed to plaintiff's counsel, and proof of such mailing created a presumption (although not an irrebuttable one) that plaintiff's counsel received the order in the mail; on the other hand, the plaintiff's affidavits filed below constituted some evidence that the subject order was not received in the mail by plaintiff's counsel. It therefore became a question of fact as to whether plaintiff's counsel had received the subject order in the mail ....

World on Wheels of Miami, Inc. v. Int'l Auto Motors, Inc., 569 So.2d 836, 837 n. 1 (Fla. 3d DCA 1990).

Here, the Surety has proven, beyond doubt, that it did not receive the notice because the original notice is currently in the possession of the Clerk and sports a U.S. Postal Service label confirming it was not delivered to the Surety.

However, the State argues that the presumption is not rebuttable in this situation because section 903.26(2)(a) provides:

> A certificate signed by the clerk of the court or the clerk's designee, certifying that the notice required herein was mailed or electronically transmitted on a specified date and accompanied by a copy of the required notice, shall constitute sufficient proof that such mailing or electronic transmission was properly accomplished as indicated therein. **If such mailing or electronic transmission was properly accomplished as evidenced by such certificate, the failure of the surety agent, of a company, or of a defendant to receive such notice shall not constitute a defense to such forfeiture and shall not be grounds for discharge**, remission, reduction, set aside, or continuance of such forfeiture.

§ 903.26(2)(a), Fla. Stat. (2013) (emphasis added).

Subsection (2)(a) would appear to resolve the issue against the Surety. It expressly makes the presumption of receipt irrebuttable, contrary to the precedents set forth *supra*. However, subsection (2)(a) applies to the notice of forfeiture the Clerk must transmit to the surety, *not* the notice the Clerk must transmit to the surety that a defendant is required to appear in court (which is governed by subsection (1)).

***4** The Court must therefore determine if the Legislature intended to make irrebuttable the presumption of receipt upon mailing for the notice required by subsection (1). The Court rejects the State's attempt to graft subsection (2)(a) into subsection (1)(b) for three reasons.

First, the Legislature could have included the irrebuttable language in subsection (1) but chose not to do so. This indicates an intent that it apply only to section 903.26(2).

Second, Florida courts have consistently held that

> [S]uch statutes should be construed liberally to favor sureties, since justice does not favor forfeiture. Liberal interpretation of such statutes in favor of sureties (1) saves the state the expense and burden of keeping an accused in jail pending trial; (2) promotes an accused's liberty interest consistent with the presumption of innocence; and (3) provides incentives to sureties to offer bails bonds and to pursue those who flee the jurisdiction.

Bd. of Com. of Brevard v. Barber Bonding Agency, 860 So. 2d 10, 12 (Fla. 5th DCA 2003).

Third, the appellate courts have interpreted subsection (1)(b) as required express actual notice.

> Section 903.26(1)(b) not only requires actual notice, it requires "express actual notice." In other words, a surety must be provided with direct information of a defendant's appearance date.

Allied Fid. Ins. Co. v. State, 499 So. 2d 932, 934 (Fla. 1st DCA 1986). *See Accredited Sur. & Cas. Co., Inc. v. Hagman*, 467 So. 2d 1065, 1066 (Fla. 4th DCA 1985) ("the general rule is that the clerk of the court must give a surety three days' actual notice of a proceeding requiring the presence of the defendant. Failure to furnish this notice as required by statute invalidates an order of estreature and forfeiture."). There is no dispute here that the Surety did not receive express actual notice.

Consequently, the Court grants the Motion to Set Aside the Estreature. However, the Surety is not entitled to discharge of the bond because it has not established prejudice due to the lack of notice.

> A surety may be entitled to discharge on its bond where there is a showing by competent evidence that the State's conduct in failing to comply with the statutory notice requirements of section 903.26(1)(b) caused prejudice. However, lack of pre-forfeiture notice, without prejudice, is not a valid reason for relieving a surety of all obligations on the bond. Further, prejudice will not be presumed from a failure to give the surety notice of the trial date. In this case, as in *Wiley*, no evidence of resultant prejudice was submitted in support of the motion for discharge.

State for Use & Benefit of Metro. Dade County v. Saiz, 547 So. 2d 208, 209 (Fla. 3d DCA 1989). *See Wiley v. State*, 451 So. 2d 916, 922 (Fla. 1st DCA 1984).

The Surety has the right to the notice it did not receive before the forfeiture. If it fails to produce the defendant again then the Court will again forfeit the bond and the Surety will have another 60 days to produce Smith in order to obtain a discharge of the forfeiture and bond.

DONE and ORDERED in Miami-Dade County, Florida this 13th day of November, 2014.

<<signature>>

Miguel M. dela O

Circuit Judge

Footnotes

1 The Court did not hold an evidentiary hearing on the Motion because it has no basis for discharging the forfeiture. The Court assumes for purposes of this Order that the Surety would be able to prove all assertions in its affidavit and its factual proffer to the Court.

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