

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2005

AMADO EVARITO GARCIA,
Appellant,

v.

**RENEE STEWART, WOODGATE CONDOMINIUM ASSOCIATION, INC.,
JOHN TENANT and JANE TENANT,
Appellees.**

No. 4D04-1836

[July 27, 2005]

ON MOTION FOR REHEARING

GROSS, J.

The Association's motion for rehearing has called our attention to additional facts that were not previously made a part of the record. The facts pertain to the Association's participation in a separate circuit court lawsuit involving the foreclosure of a first mortgage on the property. These additional facts do not change the result in this case. Even though the Association filed a lien foreclosure cross-claim in the other lawsuit, Garcia still had the right to challenge the disbursement of funds in this action through a rule 1.540(b) motion.

There were two mortgages on Garcia's property. The holder of the first mortgage was M&T Mortgage Corp. The holder of the second mortgage, which was at issue in this case, was Renee Stewart.

M&T filed a mortgage foreclosure action in March, 2002, naming Garcia and the Association as defendants. The M&T action was assigned to Judge Lynch. The Association answered the M&T action and filed a cross-claim against Garcia seeking foreclosure on its claim of lien. Garcia filed no responsive pleading in the M&T action.

The following month, Stewart filed a second foreclosure suit to foreclose her second mortgage. The Stewart action was assigned to Judge Burnstein under a different case number than the M&T action.

The Association filed an answer in the Stewart action, but Garcia filed no responsive pleading.

M&T acquired a summary final judgment against Garcia from Judge Lynch on July 14 of that year; Stewart acquired a default final judgment from Judge Burnstein on July 18. Although the Association secured a default against Garcia on its lien foreclosure claim in the M&T action, it never obtained a final judgment. In the Stewart action, Judge Burnstein dismissed the Association as a defendant in the final judgment of foreclosure.

The foreclosure sale in the Stewart action occurred on February 10, 2003; there had not yet been a foreclosure sale in the M&T action. The buyer was Escala Homes & Mortgages. On February 21, after the clerk paid off the junior lienholders and issued a certificate of title to Escala, a surplus remained in the court registry. Escala moved to intervene in the M&T action, explaining that it had recently purchased the property in the Stewart action foreclosure sale and that it was willing to pay off M&T's first mortgage.

On March 20, 2003, the Association secured an order from Judge Lynch, the M&T action judge, disbursing the proceeds from the Stewart action, the case presided over by Judge Burnstein, from which the Association had been dismissed as a party.

Based on these new facts, the Association argues that the panel's opinion incorrectly assumed that the "Association filed no pleading concerning its claim of lien." The non-existence of a pleading in this case was significant, because it went to Garcia's entitlement to challenge the disbursement order under rule 1.540. However, that critical fact remains unchanged because the pleadings the Association filed were in a separate lawsuit. We are aware of no rule of procedure or administrative order that authorized the trial judge in the M&T action to reach over into a different lawsuit, before a different judge, and enter an order disbursing funds in that case to a party that had been dismissed by a final judgment. This is not a case where the Association had secured a final judgment in the M&T action and was pursuing some post-judgment remedy. The existence of the Association's pleadings in the M&T action did not affect Garcia's right to attack the March 26, 2003 order in the Stewart action under rule 1.540(b)(4).

The Association's motion for rehearing is denied.

STEVENSON, C.J., and SHAHOO, J., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. 02-7571(21).

Brenda Cox of Brenda Cox, P.A., Boca Raton, for appellant.

Ronald E. D'Anna and Jennifer J. Kramer of McClosky, D'Anna & Dieterle, LLP, Boca Raton, for appellee Woodgate Condominium Association, Inc.