

NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2006

FRANCISCO CARNERO and JUANA  
CARNERO, individually and as  
Mother and Natural Guardian of  
Gisela Carnero and Clarita  
Carnero, Minors,

Appellants,

vs.

NATIONAL HOME MORTGAGE  
CORPORATION, and RICARDO  
CARNERO, et al.

Appellees.

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CASE NO. 3D05-2112

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LOWER

TRIBUNAL NO. 02-22051

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Opinion filed June 21, 2006.

An Appeal from the Circuit Court for Miami-Dade County,  
Lawrence A. Schwartz, Judge.

Jorge Rodriguez-Chomat & Associates, P.A., and Jorge  
Rodriguez-Chomat, for appellants.

Eisinger, Brown, Lewis & Frankel, P.A., and Jed L. Frankel  
(Hollywood), for appellees.

Before LEVY, GREEN, and SHEPHERD, JJ.

PER CURIAM.

Juana Carnero, individually and on behalf of her daughters, appeals a final order dismissing her second amended declaratory complaint for lack of standing. The complaint had sought a declaration that the home in which she and her daughters currently reside legally still belongs to her incapacitated husband, Francisco Carnero, despite quit claim deeds which reflect that her stepson, Ricardo Carnero, is the owner of the property.

On a cross-appeal, Ricardo Carnero<sup>1</sup> appeals the order vacating a prior summary judgment entered in his favor on the ownership issue. Ricardo Carnero asserts, and we agree, that the final summary judgment entered in his favor should not have been set aside pursuant to Florida Rule of Civil Procedure 1.540(b) where the motion seeking relief under this rule was unsworn as to the claim of excusable neglect and there was no sworn evidence of excusable negligence otherwise adduced at the hearing below. Because we conclude that the issue raised on the cross-appeal is completely dispositive and renders the main appeal moot, we do not address the main appeal.

The trial court had entered a final summary judgment in favor of Ricardo Carnero on the issue of the subject property's ownership. Juana Carnero never appealed this final judgment.

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<sup>1</sup> The defendants in the underlying case, and appellees here, are Ricardo Carnero, National Home Mortgage Corporation, Miriam Ruiz, Victor J. Carnero, and Gloria C. Morales. These parties will be collectively referred to as "Ricardo Carnero" or "appellees."

Rather, she filed an emergency unsworn motion for the court to set aside the final summary judgment pursuant to Rule 1.540(b) on the grounds that the "legal issue raised in this motion was inadvertently not raised in the Complaint and memorandums of law filed by plaintiff's previous attorney or it was not raised due to excusable error." The motion also sought leave to amend her pleadings. Moreover, no sworn evidence was introduced at the hearing below in support of the motion. The trial court granted the motion to set aside the final summary judgment and granted Juana Carnero leave to amend her pleadings.

We agree with Ricardo Carnero's argument on cross-appeal that the trial court abused its discretion when it set aside the final summary judgment in his favor. The motion was unsworn as it related to the excusable neglect claim and therefore was insufficient as a matter of law. See Eden Park Mgmt., Inc. v. Zagorski, 821 So. 2d 1263 (Fla. 4th DCA 2002)(trial court abused its discretion in vacating dismissal where motion seeking relief was not sworn testimony offered to establish factual basis for alleged neglect).

We therefore reverse the trial court's order setting aside the final summary judgment and remand with instruction that it be reinstated. Because the cross-appeal renders the appeal moot, we offer no opinion on the merits of Juana Carnero's main appeal.