IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ATHENE ANNUITY & LIFE ASSURANCE COMPANY,

Appellant,

v. Case No. 5D20-1848

TEAVANA HOLDINGS, EVELYN MENDEZ, DADMARIA LICEAGA, AND BRANTLEY TERRACE CONDOMINIUM ASSOCIATION, INC.,

Appellees.

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Opinion filed July 9, 2021

Nonfinal Appeal from the Circuit Court for Seminole County,
Jessica J. Recksiedler, Judge.

Steven C. Weitz, of Weitz & Schwartz, P.A., Fort Lauderdale, for Appellant.

Anthony N. Legendre, II, of Law Offices of Legendre & Legendre, PLLC, Maitland, for Appellee Teavana Holdings.

No Appearance for Other Appellees.

LAMBERT, C.J.

Athene Annuity & Life Assurance Company ("Athene") appeals the trial court's order that granted the Florida Rule of Civil Procedure 1.540(b) motion for relief from judgment filed by Appellee, Teavana Holdings ("Teavana"), and set aside, as void, the final summary judgment of foreclosure previously entered in Athene's favor. As explained below, Teavana improperly utilized rule 1.540(b) to relitigate issues that had been decided adversely to it by the trial court's denial of its earlier motion for rehearing filed under Florida Rule of Civil Procedure 1.530. We therefore reverse the order vacating the final summary judgment.

Athene filed suit to foreclose on a note and mortgage that were executed in 2007 by Evelyn Mendez and Irving Mendez. Teavana was named as a defendant in the litigation by virtue of an alleged inferior, later-acquired interest in the mortgaged property. Teavana was initially represented in the litigation by attorney Charles Franklin. On December 10, 2019, upon Athene's motion, a court default was entered against Teavana after a noticed hearing regarding Teavana's failure to comply with an earlier

court order to file an answer to the complaint.[1] Attorney Franklin received notice of this hearing.

Three days after the court default was entered against his client, Teavana, Attorney Franklin passed away. It does not appear that a notice of Attorney Franklin's passing was filed in the court file below. However, our record indicates that as of December 30, 2019, a notice was placed on Attorney Franklin's emails by an associate in his office, advising any person or party who contacted Attorney Franklin by email of his death and requesting that no hearings be scheduled in the interim.

Despite this, on January 31, 2020, Athene's counsel noticed for hearing a motion for final summary judgment of foreclosure that counsel had filed on January 14, 2020. The notice of hearing and the motion for summary judgment were both sent by Athene's counsel to Attorney Franklin by email.

The motion for summary judgment was scheduled to be heard on March 9, 2020. Approximately ten days before this hearing, Athene's counsel spoke with Attorney Franklin's inventory attorney,[2] who purportedly

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[1] The order under review also vacated this earlier court-ordered default. Our disposition in this appeal makes it unnecessary to separately consider the trial court's setting aside of the order of default.

[2] An inventory attorney takes possession of the files of a member of the Florida Bar who dies, disappears, is disbarred or suspended, or suffers an involuntary leave of absence due to military service and no other

advised Athene's counsel that he would forward Attorney Franklin's case file to Teavana. The inventory attorney did not file an appearance as counsel of record for Teavana. Athene proceeded with the March 9 summary judgment hearing.

Neither Teavana, nor, for that matter, any of the other defendants, appeared at the summary judgment hearing.[3] The trial court entered the final summary judgment of foreclosure in favor of Athene that same day.

Significantly here, Teavana, through different counsel, took steps to challenge the final summary judgment when it timely filed a motion for rehearing under rule 1.530. Although the motion was brief, Teavana sought relief from the judgment because, though its counsel was deceased, Athene's counsel nevertheless inappropriately, "unilaterally" set the summary judgment hearing with Teavana's then-deceased counsel. Teavana argued that, under these circumstances and with Attorney

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responsible party capable of conducting the member's affair is known. An inventory attorney may give the file to a client to find substitute counsel; may make referrals to substitute counsel with the agreement of the client; or may accept representation of the client, but is not required to do so. *See generally* R. Regulating Fla. Bar 1-3.8.

[3] Teavana's representative would later testify at the rule 1.540 hearing that he did not hear from Attorney Franklin's inventory attorney prior to the summary judgment hearing.

Franklin's death, it received no actual notice of the hearing and thus never had an opportunity to defend against Athene's summary judgment motion.

In an unelaborated order, the trial court denied Teavana's motion for rehearing. Teavana's new counsel was listed on the order's certificate of service.

Teavana did not appeal. Instead, after the time for filing an appeal had lapsed, Teavana filed a rule 1.540(b) motion to vacate both the final summary judgment and the December 10, 2019 court default.[4] Teavana argued that the judgment was void under rule 1.540(b)(4) because, due to its counsel's unexpected death, of which it was unaware, its due process rights to notice and an opportunity to be heard in opposition to Athene's summary judgment motion were violated. Teavana also argued that Athene's counsel knew that Attorney Franklin had died yet nevertheless improperly went forward with the motion for summary judgment, including attending the March 9, 2020 summary judgment hearing.

An evidentiary hearing was held on this motion before a judge different from the one who had entered the earlier final summary judgment of foreclosure and the order denying Teavana's rule 1.530 motion for rehearing.

[4] As previously indicated, we find it unnecessary to address the trial court's setting aside of this default.

This second judge granted Teavana's rule 1.540(b) motion and vacated the final judgment. The court limited its holding to finding the judgment void under rule 1.540(b)(4), explaining in its order that Teavana, having received no notice of its attorney's death, resultingly never received notice of the summary judgment hearing. This appeal ensued.

Athene's primary argument on appeal is that, irrespective of any insufficient notice provided to Teavana of the summary judgment hearing, Teavana timely raised its present procedural due process arguments in its unsuccessful rule 1.530 motion for rehearing. Athene submits here that once that motion was denied, Teavana needed to timely challenge the final summary judgment of foreclosure by appeal and, having failed to do so, it was precluded from then raising the same lack of due process arguments by way of its rule 1.540(b) motion.

We agree. "[A] party may not utilize a motion for relief from judgment under rule 1.540(b), Fla. R. Civ. P., to relitigate issues which have been previously litigated in a motion for rehearing pursuant to rule 1.530, Fla. R. Civ. P." *Averbuch v. Lauffer*, 516 So. 2d 973, 974 (Fla. 5th DCA 1987) (quoting *Sloan v. Sloan*, 393 So. 2d 642, 644 (Fla. 4th DCA 1981)). Pertinent here, "[i]f the grounds are identical, a party's failure to seek appellate review

of the order denying the motion for rehearing precludes further judicial review." *Id.* (quoting *Sloan*, 393 So. 2d at 644).

Admittedly, Teavana's instant rule 1.540(b) motion was more detailed than its rule 1.530 motion for rehearing. Nevertheless, the "due process" arguments raised in both motions were essentially the same, namely: (1) Athene's counsel[5] unilaterally and improperly set the motion for summary judgment for hearing at a time when Teavana's counsel of record had already passed away; (2) Teavana, being unaware of its counsel's death, did not know about and, therefore, did not attend the summary judgment hearing; and (3) under these facts, the final judgment should be vacated because Teavana's due process rights of notice and the opportunity to be heard were violated.

Because Teavana was able to seek appellate review of the final summary judgment following the denial of its rule 1.530 motion for rehearing, but failed to do so, we hold that, under *Averbuch*, it was precluded from raising these claims in its rule 1.540(b) motion. Accordingly, we reverse the

[5] To be clear, Athene's counsel on appeal is not the attorney who, after Attorney Franklin's death, filed the motion for summary judgment and notice of hearing and thereafter attended the summary judgment hearing.

order with instructions to the trial court to reinstate the final summary judgment of foreclosure.

REVERSED and REMANDED, with instructions.[6]

COHEN and EISNAUGLE, JJ., concur.

[6] We acknowledge that Teavana also sought relief in its rule 1.540(b) motion under subsections (1) ("mistake, inadvertence, surprise, or excusable neglect" for its failure to attend the summary judgment hearing due to the lack of notice) and (3) (in which it alleged "misconduct of an adverse party") of the rule. The trial court made no specific findings in its order that Teavana was entitled to relief on either of these grounds. Teavana's answer brief filed here seemingly infers that we should nevertheless affirm the order under the "Tipsy Coachman" doctrine, which "allows an appellate court to affirm a trial court decision that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" *U.S. Bank, N.A., for RFMSI 2006-S10 v. Adams*, 219 So. 3d 211, 213 (Fla. 2d DCA 2017) (quoting *City of Clearwater v. Sch. Bd. of Pinellas Cnty.*, 905 So. 2d 1051, 1057 (Fla. 2d DCA 2005)). Because Teavana's claims under subsections (1) and (3) are based on essentially the same arguments and facts upon which it contended that the judgment was void under rule 1.540(b)(4), as well as its claim for relief under its earlier rule 1.530 motion, Teavana's argument fails.