NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

IOU CENTRAL INC. d/b/a IOU FINANCIAL,

Appellant,

v.

PEZZANO CONTRACTING AND DEVELOPMENT, LLC, and VINCENT R. PEZZANO as Guarantor,

Appellees.

Case Nos. 2D19-438
2D19-1117

CONSOLIDATED

Opinion filed November 13, 2020.

Appeal from the Circuit Court for Collier County; Lauren L. Brodie, Judge.

Amy M. Wessel and Matthew R. Chait of Shutts & Bowen LLP, West Palm Beach; Paul G. Wersant, Suwanee, Georgia, for Appellant.

Jeffrey D. Sam and Henry Paul Johnson of Henry Johnson Law, Naples, for Appellees.

ATKINSON, Judge.

In this consolidated appeal, IOU Central Inc. d/b/a IOU Financial (Lender) seeks review of the trial court's final judgment awarding attorney's fees, arguing that the trial court erred in concluding that Pezzano Contracting and Development, LLC (Pezzano Contracting) and Vincent R. Pezzano (Mr. Pezzano) (collectively, Borrowers) were the prevailing parties in the underlying litigation because the trial court's ruling was not an adjudication on the merits. Lender also seeks review of the amended final judgment, arguing that the trial court erred in amending the original final judgment under Florida Rule of Civil Procedure 1.540(b) and that it lacked jurisdiction to amend it under Florida Rule of Civil Procedure 1.530(g). We affirm the final judgment awarding attorney's fees. However, we reverse the amended final judgment and remand with instructions for the trial court to reinstate the original final judgment.

Background

On April 21, 2016, Pezzano Contracting obtained a $100,000 loan from Lender, and Mr. Pezzano executed a personal guaranty for repayment of the loan. The loan document contained the following relevant provisions:

> **22. GEORGIA GOVERNING LAW**
> Unless prohibited by applicable law, this Note shall be governed and construed, applied and enforced in accordance with the laws of the State of Georgia without regard to principles of conflicts of law, except that the laws of another jurisdiction may govern the perfection, the effect of perfection or nonperfection and the priority of a security interest in the collateral in accordance with the Uniform Commercial Code.
>
> **23. DISPUTE RESOLUTION**
> . . . .
>
> Except as provided below, any and all claims, lawsuits or disputes of any kind between the parties arising out of or

> relating to this Note (a "Dispute") shall be instituted in and resolved by a state or federal court in Cobb County, Georgia.
>
> Each party hereby knowingly, intentionally, voluntarily and irrevocably, with and upon the advice of counsel, (a) submits to personal jurisdiction in the State of Georgia over any suit, action or proceeding by any person arising from or relating to this Note, (b) agrees that any such action, suit or proceeding may be brought in and resolved by a state or federal court in Cobb County, Georgia, or at the option of Lender, in any state or federal court of competent jurisdiction in the county where the collateral is located, (c) submits to the jurisdiction of each such court in any suit, action or proceeding, and (d) waives any objection that it may have to the laying of venue of any such action, suit or proceeding in any of such courts.
>
> Each party hereby waives any challenge to the jurisdiction or venue of such courts over such claims, lawsuits or disputes.

On May 15, 2017, Pezzano Contracting defaulted on the note and Mr. Pezzano failed to pay the debt. On June 7, 2017, Lender filed a complaint in Collier County, Florida, for, inter alia, breach of promissory note against Pezzano Contracting and breach of guaranty against Mr. Pezzano. Borrowers answered and asserted affirmative defenses, primarily arguing that the loan was usurious under Florida law. The case proceeded to a bench trial on June 14, 2018.

On July 5, 2018, the trial court entered the original final judgment in favor of Borrowers, the cause "having been heard before the Court on June 14, 2018, upon the evidence presented at trial." Under the heading "FACTUAL FINDINGS," the original final judgment included that "the instant action should have been brought in the State of Georgia." Under the heading "CONCLUSIONS," the trial court ordered that Lender "shall take nothing from its action against" Borrowers, which it identified as the "prevailing parties," and reserved "jurisdiction regarding the awarding of attorney's fees and costs to [Borrowers]." Neither party filed a notice of appeal from the judgment.

On July 6, 2018, Borrowers filed a motion for attorney's fees and costs. On August 9, 2018, before the trial court ruled on Borrowers' fees and costs motion, Lender filed a complaint against Borrowers in Cobb County, Georgia. Then, on September 9, 2018, the Florida trial court entered its Order on Defendants' Motion for Attorney's Fees and Costs, determining that Borrowers were entitled to recover their fees and costs as "the prevailing parties on all issues and matters before this Court" after "[a]ll issues and matters, which were the subject of the Amended Complaint filed in this action, were tried before the Court via non-jury trial and adjudicated on June 14, 2018."

Thereafter, Borrowers filed a motion for summary judgment in the Georgia court, arguing that Lender's claims were barred by collateral estoppel and res judicata. The Georgia court entered an order denying Borrowers' motion for summary judgment, concluding that the action in Florida had not ended in an adjudication on the merits.

On January 4, 2019, the Florida trial court entered a final judgment as to the amount of fees, stating that Borrowers were "the prevailing parties in the instant matter relating to claims brought against them by" Lender. On January 8, 2019, Borrowers filed a motion for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(a) seeking correction of what they described as clerical mistakes in the original final judgment including, among other things, the omission of findings that all matters that were the subject of the operative complaint had been tried and adjudicated, that Borrowers were the prevailing parties on all issues, and that the final judgment was on the merits. The trial court conducted a hearing on the motion, during which it stated the following:

> So the question is I think you're precluded under Rule 1.530 from a time standpoint, and I'm trying to see whether I can do anything on my own pursuant to 1.540(b), because I do think that it's disingenuous for the plaintiff to file a claim in Georgia knowing full well that we had a full trial, that there was an adjudication on the merits granted. That's the final judgment you submitted to me, Mr. Johnson, after we had our phone conference. But, I mean, this wasn't on a motion, this was after a full trial was held.
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> . . . .
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> I mean, I'm even wondering whether fraud, misrepresentation or other misconduct of an adverse party would apply, only because I think everyone knew that we had a full trial on the merits. And I don't like to think that something is being misconstrued to the point that the final judgment I entered is not—is not clear enough for another court to understand what actually transpired.

On February 27, 2019, the trial court entered an order on Borrowers' rule 1.540 motion, which order included the following:

> This matter came before the Court on February 19, 2019 on [Borrower's] Motion for Relief from Judgment pursuant to Rule 1.540(a), Fla. R. Civ. P. This Court denies the motion based on that ground.
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> However, this Court, on its own Motion and pursuant to Rule 1.540(b), Fla. R. Civ. P., in an effort to prevent a miscarriage of justice and based on the alleged misrepresentation of the [Lender] in a proceeding in another state, is obligated to clarify the Final Judgment previously entered so as to not confuse or mislead another court of competent jurisdiction.
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> As such, an Amended Final Judgment will be entered contemporaneously with this Order.

The trial court entered an amended final judgment, stating that "[a]n entire trial was held whereby the Court adjudicated the merits of the dispute based on a business relationship between the parties." The trial court again listed one item under the heading "FACTUAL FINDINGS": "The Court finds that the instant action should

have been brought in the State of Georgia." Under the heading "CONCLUSIONS," the trial court again included that Borrowers were "the prevailing parties in the instant action" and that Lender "shall take nothing from its action against" them.

Final Judgment

A trial court's determination of the prevailing party is reviewed for an abuse of discretion. Tubbs v. Mechanik Nuccio Hearne & Wester, P.A., 125 So. 3d 1034, 1039 (Fla. 2d DCA 2013) (citing T & W Developers, Inc. v. Salmonsen, 31 So. 3d 298, 301 (Fla. 5th DCA 2010)). However, a de novo standard of review is applied "when the trial court's determination of which party prevails depends on the interpretation of a statute or contract." Id.

Lender argues that the trial court erred in awarding prevailing party attorney's fees to Borrowers because the trial court ruled only that the case should have been filed in Georgia (that Lender had improperly filed the action in Florida), which was not an adjudication on the merits of Lender's claims. Additionally, Lender argues that in concluding that the case should have been filed in Georgia, the trial court essentially declined to exercise jurisdiction over the case and therefore lacked jurisdiction to award fees to Borrowers.

Borrowers argue that there is ample support on the face of the original final judgment to conclude that the trial court adjudicated the merits of the case, contending that the order contains no indicia that the trial court ruled solely on issues of venue or that it declined to exercise jurisdiction. Borrowers point out that the original final judgment was based expressly upon evidence presented at trial, that the trial court found in favor of Borrowers who were identified as the prevailing parties, that it

announced Lender "shall take nothing from its action against" Borrowers, and that it reserved jurisdiction regarding the awarding of attorney's fees and costs to Borrowers.

Borrowers also contend that the record resolves any ambiguity in its favor. Borrowers never raised improper venue as an affirmative defense or filed a motion for dismissal based upon improper venue. Borrowers point out that the topic of location was broached solely in relation to the issue of choice of law. Borrowers argue that the trial court's pronouncements (at trial and at a subsequent telephonic hearing) indicate that the court adjudicated the case on the merits. Finally, Borrowers argue that Lender is barred from challenging the original final judgment, including the determination that Borrowers were the prevailing parties, because it failed to timely appeal the original final judgment.[1]

A dismissal for improper venue is not an adjudication on the merits. See Fla. R. Civ. P. 1.420(b) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other

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[1]Lender correctly argues that its decision not to appeal the original final judgment does not bar it from challenging the trial court's conclusion that Borrowers were the prevailing parties for fee-entitlement purposes as the issue was not ripe for appellate review until both entitlement and amount were determined by the trial court. See Ulrich v. Eaton Vance Distribs., Inc., 764 So. 2d 731, 733 (Fla. 2d DCA 2000) ("[N]otwithstanding the finality of the judgment as it relates to the underlying dispute, the attorney's fees issue is not finally resolved or ripe for appellate review until both entitlement and amount have been determined."). However, to the extent Lender's appeal could be understood as an attempt—for collateral litigation purposes—to solidify its theory that the original final judgment was not an adjudication on the merits, such relief would be barred by its failure to have filed a notice of appeal within thirty days of it being rendered. Given the unsurprisingly diametric understandings that each party has expressed regarding the meaning and effect of the original final judgment, it might not have seemed reasonable to either party to have taken an appeal from the original final judgment. At any rate, further analysis of the resulting procedural quandary that might have barred Lender from relief is unnecessary in light of this court's conclusion that the original final judgment was an adjudication on the merits.

than a dismissal for . . . improper venue . . ., operates as an adjudication on the merits."); see also Thomson McKinnon Sec., Inc. v. Slater, 615 So. 2d 781, 783 (Fla. 1st DCA 1993) ("Florida Rule of Civil Procedure 1.420(b) specifically provides that dismissal for lack of jurisdiction or improper venue does not constitute an adjudication on the merits."); Orange Blossom Enters., Inc. v. Brumlik, 430 So. 2d 13, 15 (Fla. 5th DCA 1983) ("Because the decision involves only the question of venue, there has been no determination yet on who is the prevailing party on the merits, so any award of attorney's fees will have to await the final outcome of the case.").

However, nothing in the order suggests that it constituted a dismissal. No permutation of the word "dismiss" appears in the order. And other language employed in the order provides support for the conclusion that it was a final adjudication on the merits: Based "upon evidence presented at trial," the trial court ordered that Lender "shall take nothing from its action against" Borrowers, who it described as "the prevailing parties in the instant action."

Lender points to the finding of fact indicating that "the instant action should have been brought in the State of Georgia" as support for its conclusion that the trial court merely dismissed the case based on improper venue. However, that statement could also be perceived as a comment on the applicable law, serving as an indication of the trial court's conclusion that usury law would not bar recovery if the action had been brought in Georgia. At any rate, the language is by no means so clearly indicative of dismissal on venue that the prominent language suggesting the contrary must be subordinated to it.

Even assuming a conflict in the language of the court's original final order, the resulting ambiguity would commend an examination of the entire record for the purpose of interpreting that language. See Boynton v. Canal Auth., 311 So. 2d 412, 415 (Fla. 1st DCA 1975) ("If a judgment cannot be interpreted from the language in the judgment itself, the entire record may be examined and considered for the purpose of interpreting the judgment and determining its operation and effect.").

The trial court stated that the case came down to a "question of contract, form, selection, construction, things like that." In response to the argument that the loan document permitted Lender to bring the action in any court of competent jurisdiction where the collateral is located, counsel for Borrowers stated the following: "And we would say, first of all, there is no collateral in this case. And, second of all, the concept of venue is a different issue. In this particular case, [Lender] . . . elected to come to Florida." The trial court then reflected that "there could be some conflict between the different provisions" in paragraph 23 of the loan document "[b]ecause the paragraph right above it clearly says, Any and all claims, lawsuits, or disputes of any kind between the parties arising out of and relating to this note shall be instituted and resolved by the state or federal court in Cobb County, Georgia. Then the next paragraph seems to contradict that. Okay. We'll have to see."

Importantly, neither party asserted an argument that venue was improper. There is considerable doubt that such an argument would have been successful if asserted by Borrowers because any challenge to venue was arguably foreclosed by the loan document, which provided that each party "waives any objection that it may have to the laying of venue of any such action, suit or proceeding in any of such courts. Each

party hereby waives any challenge to the jurisdiction or venue of such courts over such claims, lawsuits or disputes." (Emphasis added.) Lender was permitted to bring an action in "Cobb County, Georgia," or, at its "option," "in any state or federal court of competent jurisdiction in the county where the collateral is located." Lender would have us believe that the trial court resolved the case on an argument that was not raised by Borrowers and that was arguably foreclosed by the document governing the controversy. The implausibility of that theory belies Lender's conclusion that the order was dismissed based on venue as opposed to adjudicated on the merits.

The record reveals that the trial focused on whether the loan was usurious and whether Florida law or Georgia law applied. The trial court's statement regarding what the case "boils down to" is consistent with this notion: "[R]eally it's just a question as to what law applies. Because if Florida law applies, [counsel for Borrowers] may be right. If Georgia law applies, [counsel for Lender] may be right. So I think that's what it boils down to."

Additionally, the trial court's pronouncements (at trial and at a subsequent telephonic hearing) indicate that the court adjudicated the case based on the arguments presented at trial (which did not include improper venue):

> THE COURT: Thank you, both. I'm glad that we finally were able to have time so I can hear the entire legal argument. I know I've heard bits and pieces over the past several months. I'm going to reserve jurisdiction. I'm going to review the submissions.
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> . . . .
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> THE COURT: I've reviewed everything, and what I'm going to do is I'm entering judgment for the Defendant, because I find that Georgia — this case should have been brought in Georgia. And I'll reserve as to the issue of fees and costs.

(Emphasis added.) And in its Order on Defendants' Motion for Attorney's Fees and Costs, the trial court stated the following: "All issues and matters, which were the subject of the Amended Complaint filed in this action, were tried before the Court via non-jury trial and adjudicated on June 14, 2018."

The record resolves any ambiguity in the final judgment in favor of Borrowers, reflecting that the trial court adjudicated the case on the merits in their favor. As such, the trial court did not err in awarding prevailing party attorney's fees to Borrowers.

Amended Final Judgment

A trial court's order on a motion for relief from judgment is reviewed for an abuse of discretion. Casteel v. Maddalena, 109 So. 3d 1252, 1255 (Fla. 2d DCA 2013). However, when a trial court's decision to apply rule 1.540 is purely a question of law, we review that decision de novo. Id. The issue of whether a trial court has jurisdiction is a question of law that is also reviewed de novo. Trerice v. Trerice, 250 So. 3d 695, 697 (Fla. 4th DCA 2018) (citing Rippy v. Shepard, 80 So. 3d 305, 306 (Fla. 2012)).

Lender argues that the trial court erred in amending the original final judgment under rule 1.540(b), which provides the following:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing;

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) that the judgment, decree, or order is void; or
> (5) that the judgment, decree, or order has been satisfied, released, or discharged, or a prior judgment, decree, or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment, decree, or order should have prospective application.

The trial court amended the original final judgment "in an effort to prevent a miscarriage of justice and based on the alleged misrepresentations of the Plaintiff in a proceeding in another state," which suggests reliance on subsection (b)(3) of the rule.

The trial court erred in amending the original final judgment under rule 1.540(b)(3) because the alleged misrepresentations did not affect the judgment or the outcome of the case as they were made after entry of the original final judgment to another court in another state. See Fed. Home Loan Mortg. Corp. v. De Souza, 85 So. 3d 1125, 1126 (Fla. 3d DCA 2012) ("If a defendant seeks relief from a judgment based upon fraud, he must specify the fraud with particularity and explain why the fraud, if it exists, would change the outcome of the case."); Freemon v. Deutche Bank Tr. Co. Ams., 46 So. 3d 1202, 1204–05 (Fla. 4th DCA 2010) (holding fraud alleged must affect the case's outcome); see also St. Surin v. St. Surin, 684 So. 2d 243, 244 (Fla. 2d DCA 1996) ("If a party pleads fraud or misrepresentation with particularity and how it affected the judgment, the party is entitled to an evidentiary hearing on the motion." (emphasis added)).

Also, the trial court made no finding that misrepresentations were actually made—only that "alleged misrepresentations" were made. Mere allegations of misrepresentation are not enough to amend the original final judgment under rule

1.540(b)(3), which requires an evidentiary hearing to assess the credibility of the alleged misrepresentations and to make a finding that misrepresentations were actually made. See Casteel, 109 So. 3d at 1257 ("When a party files a motion for relief from judgment pursuant to rule 1.540(b)(3) based upon an adverse party's fraud or misconduct and the moving party clearly specifies the fraudulent conduct, the trial court must hold an evidentiary hearing before ruling on the motion. The purpose of such a hearing is to permit the trial court to assess the credibility of the allegations. The failure to hold an evidentiary hearing, in the face of specific allegations of fraudulent conduct, constitutes reversible error." (footnote omitted) (citations omitted)).

Additionally, it is questionable whether Lender's arguments to the Georgia court even constitute misrepresentations. The filings in Georgia establish Lender's understanding (or misunderstanding) of the Florida trial court's statement—that this case "should have been brought in the State of Georgia"—to mean that the trial court dismissed the case based on improper venue. Such representations by Lender's attorney to the Georgia court cannot constitute evidence of fraud or form the basis for relief under rule 1.540(b)(3). See Justice v. State, 944 So. 2d 538, 540 (Fla. 2d DCA 2006) ("Representations by an attorney for one of the parties regarding the facts . . . do not constitute evidence." (quoting Eight Hundred, Inc. v. Fla. Dep't. of Revenue, 837 So. 2d 574, 576 (Fla. 1st DCA 2003))); Knight v. Knight, 228 F. App'x 810, 812 (10th Cir. 2007) ("Knight's fraud claims merely evidence his disagreement with the legal arguments of Appellees' counsel. They are without merit.").

Moreover, because the original final judgment did not grant any relief to Lender, rule 1.540 would not apply because Borrowers did not need relief from the

original final judgment. See Fla. R. Civ. P. 1.540(b) ("On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . ."); cf. Pino v. Bank of N.Y., 121 So. 3d 23, 35–36 (Fla. 2013) ("[C]ommon sense dictates that a party would not have a reason to challenge a proceeding in which he or she has not been adversely impacted."). Thus, the trial court erred in amending the original final judgment pursuant to rule 1.540(b)(3). And Borrowers have not identified any other grounds for amending the original final judgment under rule 1.540(b) that apply.

Although the trial court did not state that it was amending the original final judgment pursuant to rule 1.530(g), Lender reasonably contends that the trial court's actions amount to an amendment of the original final judgment, which would be undertaken pursuant to rule 1.530(g), because the trial court retroactively altered its findings of fact to state that it adjudicated the case on the merits in order to "clarify" the original final judgment for "another court of competent jurisdiction." See L.B.G. Props., Inc. v. Chisholm Realty Co., 522 So. 2d 513, 514 (Fla. 4th DCA 1988) (treating motion to modify final judgment pursuant to rule 1.540 as a motion to amend the final judgment pursuant to rule 1.530 because the motion "was more closely akin to a motion for rehearing or clarification of the judgment or a motion to alter or amend the judgment to include the specifics appellant believed were necessary").

The trial court lacked jurisdiction to amend the original final judgment—which was rendered on July 5, 2018—pursuant to rule 1.530(g) because the time to amend the original final judgment had expired on July 20, 2018. See Fla. R. Civ. P. 1.530(g) ("A motion to alter or amend the judgment shall be served not later than 15 days after entry of the judgment, except that this rule does not affect the remedies in

rule 1.540(b)."); see also Bolton v. Bolton, 787 So. 2d 237, 238–39 (Fla. 2d DCA 2001) (discussing the effect of untimeliness on jurisdiction to correct "judicial errors, which include errors that affect the substance of a judgment," pursuant to rule 1.530).

Based on the foregoing, we affirm the final judgment awarding attorney's fees. However, we reverse the amended final judgment and remand with instructions to reinstate the original final judgment.

Affirmed in part, reversed in part, and remanded.

SILBERMAN and BLACK, JJ., Concur.