

Third District Court of Appeal

State of Florida

Opinion filed August 21, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1486
Lower Tribunal No. 06-4138

Amelia Perez Mesa,
Appellant,

vs.

Miami-Dade County,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz Judge.

Alvarez | Gonzalez | Menezes, LLP, and Ignacio M. Alvarez and Carlos F. Gonzalez, for appellant.

Abigail Price-Williams, Miami-Dade County Attorney, and Eric A. Rodriguez, Assistant County Attorney, for appellee.

Before LINDSEY, HENDON, and GORDO, JJ.

GORDO, J.

Amelia Perez Mesa appeals the trial court's decision to deny her Motion to Vacate the Order of Dismissal brought pursuant to Florida Rule of Civil Procedure 1.540 following the dismissal of her lawsuit for lack of prosecution. We conclude the trial court did not abuse its discretion and affirm.

FACTS & PROCEDURAL HISTORY

Mrs. Mesa, a former Miami-Dade County firefighter, filed suit in 2006 against the County seeking damages for sexual discrimination and retaliation. From 2012 to 2017 there was no record activity in the case, which gave rise to the lower court issuing a Notice of Lack of Prosecution and ordering Mrs. Mesa to appear for a hearing. On December 13, 2017, the trial court dismissed the action for lack of prosecution finding there had been no record activity following the notice, no stay had been issued by the court and no party had shown good cause why the action should remain pending.

On April 18, 2018, Mrs. Mesa filed a timely motion to vacate the order of dismissal asserting she was entitled to rule 1.540(b) relief because her attorney's conduct amounted to excusable neglect. In her supporting affidavit, Mrs. Mesa declared that between 2011 and 2016 she and her attorney, W. Aramis Hernandez, had regular meetings and discussions about the status of the litigation. Mr. Hernandez stopped returning her calls toward the end of 2016. Mrs. Mesa asserted it was not until the lower court issued notice that she learned Mr. Hernandez had

stopped prosecuting her case. Nonetheless, after receiving notice, Mrs. Mesa acknowledged she did not take any action prior to the scheduled hearing. She asserted instead that Mr. Hernandez advised he would file a notice of withdrawal as her attorney.

The trial court held an evidentiary hearing on Mrs. Mesa's motion to vacate the order of dismissal on June 18, 2018. During the hearing, Mrs. Mesa did not testify. Her counsel argued that she believed her case was being litigated and the dismissal was punishment for trusting her attorney. However, Mr. Hernandez testified that Mrs. Mesa was "very well aware" he could not represent her or file any documents on her behalf to keep the litigation moving forward. He advised that he had made her aware he had no intention of filing any documents because doing so would mislead the court. The trial court denied the motion to vacate dismissal.

Mrs. Mesa appeals asserting that the trial court abused its discretion in denying her motion because the failure of her attorney to litigate her case was due to excusable neglect.

STANDARD OF REVIEW

"The denial of a motion for relief from final judgment under Florida Rule of Civil Procedure 1.540(b) is reviewed for an abuse of discretion." Noel v. James B. Nutter & Co., 232 So. 3d 1112, 1115 (Fla. 3d DCA 2017). "The trial court's discretion is abused 'only where no reasonable [person] would take the view adopted

by the trial court.” Marques v. Garcia, 245 So. 3d 900, 904 (Fla. 3d DCA 2018) (quoting Hyatt Corp. v. Howarth, 678 So. 2d 823, 824 n.1 (Fla. 3d DCA 1996)).

“[A] trial court is accorded broad discretion in determining rule 1.540(b) motions” Tikhomirov v. Bank of New York Mellon, 223 So. 3d 1112, 1116 (Fla. 3d DCA 2017). “[A]n appellate court will not disturb an order of the trial court in the exercise of its judicial discretion unless an abuse of that discretion is clearly shown.” Feldman v. Feldman, 324 So. 2d 117, 118 (Fla. 3d DCA 1975). The burden is on the appellant to clearly show such an abuse of discretion. Id.

LEGAL ANALYSIS

Rule 1.540(b)(1) authorizes the trial court to relieve a party from an order of dismissal for mistake, inadvertence, surprise or excusable neglect. Mrs. Mesa seeks relief for her attorney’s inaction, which she argues was based on a reasonable misunderstanding. Indeed, “[e]xcusable neglect is found ‘where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir.’” Noel, 232 So. 3d at 1115–16 (quoting Elliott v. Aurora Loan Servs. LLC, 31 So. 3d 304, 307 (Fla. 4th DCA 2010)). However, rule 1.540(b)(1) “envisions an *honest mistake* made during the regular course of litigation, including those that result from oversight, neglect, or accident.” Id. at 1115 (emphasis added) (quoting Ocwen Loan Servicing, LLC v. Brogdon, 185 So. 3d 627, 629 (Fla. 5th DCA 2016)).

Here, Mr. Hernandez’s testimony during the hearing on the motion to vacate clearly shows his conduct was deliberate rather than inadvertent. Mrs. Mesa’s affidavit presented to the trial court failed to prove Mr. Hernandez’s conduct was due to excusable neglect. See Noel, 232 So. 3d at 1116 (quoting Elliott, 31 So. 3d at 307) (“Excusable neglect must be proven by sworn statements or affidavits.”).

On appeal, Mrs. Mesa fails to meet her burden to clearly show an abuse of discretion. “After carefully reviewing the briefs of counsel and examining the [appellant]’s motion and evidence presented in support thereof before the trial court, we find the same fall short of establishing any of the grounds which could afford [appellant] (plaintiff below) relief under [rule] 1.540(b).” Carmin v. Wall, 309 So. 2d 23, 23–24 (Fla. 2d DCA 1975).

CONCLUSION

Based on the record before us, including the evidence presented before the trial court in support of Mrs. Mesa’s motion, we conclude the trial court did not abuse its discretion in denying the motion to vacate dismissal. Accordingly, we affirm.

Affirmed.