

Third District Court of Appeal

State of Florida

Opinion filed August 7, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-340
Lower Tribunal No. 17-5391

Rinconcito Latino Cafeteria, Inc., and Jose M. Moreno,
Appellants,

vs.

Jose A. Ocampos,
Appellee.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Maria de Jesus Santovenia, Judge.

Avelino J. Gonzalez, P.A. and Avelino J. Gonzalez, for appellants.

Neil Rose (Hollywood); Eddy Marban, for appellee.

Before SCALES, LINDSEY and GORDO, JJ.

GORDO, J.

Rinconcito Latino Cafeteria, Inc. and Jose Moreno appeal the trial court's order granting Jose Ocampos' motion to set aside the order dismissing the case for lack of prosecution. Because the trial court failed to conduct an evidentiary hearing before granting the motion, we reverse and remand.

On October 18, 2017, Appellee filed his First Amended Complaint for minimum wage violation against Rinconcito Latino Cafeteria, Inc. and individual liability against Jose Moreno. On November 9, 2017, Appellee filed his Notice of Taking Depositions, which was the last record filing before the case became dormant for eleven months. On October 12, 2018, the lower court issued a Notice of Lack of Prosecution and ordered the parties to appear for a hearing on the court's motion to dismiss for lack of prosecution. Appellee failed to appear at the noticed hearing on December 6, 2018, and despite there having been record activity¹ in the case following service of the Notice of Lack of Prosecution and Order to Appear, the trial court dismissed the case for lack of prosecution.

Appellee claims he never received the Notice of Dismissal. In fact, after the dismissal order, Appellee's counsel contacted Appellants to extend the time to file

¹ The record specifically shows that on October 31, 2018, Appellee had filed his Notice for Jury Trial and on November 7, 2018, the trial court entered an Order of Referral to Mediation and a Uniform Order Setting Cause for Jury Trial and Pre-Trial Instructions. On November 21, 2018, Appellee filed a Notice of Scheduling Mediation.

witness and exhibit lists. Appellants did not inform Appellee that the case was dismissed for lack of prosecution and agreed to the extension request.

On January 18, 2019, forty-three days after the trial court dismissed the action, Appellee filed his Motion to Set Aside Order Dismissing Cause for Lack of Prosecution. Appellee asserted the court was not authorized to dismiss the action because there was record activity within sixty days following the service of the Notice of Lack of Prosecution and Order to Appear, and claimed there was excusable neglect pursuant to Florida Rule of Civil Procedure 1.540(b) due to a substantial reduction in counsel's office staff and because he was in a federal jury trial on December 6, 2018, with his only assistant.

On January 25, 2019, Appellants filed their response to Appellee's motion requesting that the court deny the motion based on Appellee's failure to attend the hearing, failure to show good cause why the action should remain pending, and failure to establish relief based on excusable neglect.

Appellee's Motion to Set Aside Order Dismissing Cause for Lack of Prosecution was noticed on the trial court's general motion calendar on January 31, 2019. Upon hearing only argument by the parties, the court granted Appellee's motion and vacated the order of dismissal.

Appellants appeal the order asserting the trial court lacked jurisdiction to vacate the dismissal, the trial court erred in granting Appellee's motion without first

conducting an evidentiary hearing and Appellee failed to establish entitlement to rule 1.540 relief.

Florida Rule of Civil Procedure 1.540(b) authorizes a trial court, within one year of its order, to grant relief for mistake, inadvertence, surprise, or excusable neglect. “Because a trial court is accorded broad discretion in determining rule 1.540(b) motions, the standard of review of an order on a rule 1.540(b) motion for relief from judgment is whether there has been an abuse of the trial court’s discretion.” Tikhomirov v. Bank of New York Mellon, 223 So. 3d 1112, 1116 (Fla. 3d DCA 2017) (quoting Freemon v. Deutsche Bank Trust Co. Americas, 46 So. 3d 1202, 1204 (Fla. 4th DCA 2010)).

“Where a motion under rule 1.540(b) sets forth ‘a colorable entitlement to relief,’ the trial court should conduct an evidentiary hearing to determine whether such relief should be granted.” Bayview Loan Servicing, LLC v. Dzidzovic, 249 So. 3d 1265, 1267-68 (Fla. 2d DCA 2018) (quoting Cottrell v. Taylor, Bean & Whitaker Mortg. Corp., 198 So. 3d 688, 691 (Fla. 2d DCA 2016)). Here, Appellee’s written motion presents a colorable claim for rule 1.540 relief based on excusable neglect. Where such a claim is raised and contested, as in the case before us, “[a] trial court errs in granting a motion for relief from judgment without affording the opposing party an opportunity to be heard at an evidentiary hearing.” Arcila v. BAC Home Loans Servicing, L.P., 145 So. 3d 897, 898 (Fla. 2d DCA 2014). Accordingly,

we reverse the order vacating dismissal and remand for an evidentiary hearing. We express no opinion as to the validity of the excusable neglect claim.

Reversed and remanded.