

Third District Court of Appeal

State of Florida

Opinion filed October 7, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-712
Lower Tribunal No. 16-22530

Z Roofing, Inc.,
Appellant,

vs.

Bank of America, N.A., etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jacqueline Hogan Scola, Judge.

Roger Cabrera, P.A., and Roger Cabrera, for appellant.

Liebler Gonzalez & Portuondo, and Tricia J. Duthiers and Elizabeth A. Henriques, for appellee.

Before EMAS, C.J., and SCALES and HENDON, JJ.

HENDON, J.

Z Roofing, Inc.¹ appeals from the entry of a final summary judgment of re-foreclosure entered in favor of the plaintiff, Bank of America, N.A.² We reverse.

I. FACTS

In August 2016, the Plaintiff filed a complaint for mortgage re-foreclosure against “Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc.,” asserting that “Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc.” entered into possession of the property by virtue of a recorded Certificate of Title, but any claim of interest that “Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc.” has as a result of the mechanic’s lien judgment is inferior to the lien of the mortgage. The facts leading up to the filing of this re-foreclosure complaint are as follows.

On January 27, 2006, Jonathan Aponte executed a note and mortgage in favor of the Plaintiff. The mortgage encumbered a specific condominium unit at the View West Condominium.

On June 1, 2006, a claim of lien was filed for unpaid roofing work at the View

¹ Z Roofing, Inc. is referred to throughout the record and in the briefs as either Z Roofing, Inc., Z-Roofing, Inc., or Z Roofing. For ease of reference, we utilize Z Roofing, Inc.

² The initial residential foreclosure action was commenced by the original lender, Countrywide Home Loans, Inc. Thereafter, Federal National Mortgage Association [“FNMA”] stepped in for Countrywide. The re-foreclosure action was commenced by FNMA, and while the re-foreclosure action was pending, Bank of America was substituted for FNMA. Thus, despite which entity was the plaintiff at any given time, they will be referred to as “Plaintiff” for ease of reference.

West Condominium. The claim of lien was on “Z Roofing” letterhead, but the claim of lien provides that the lienor is “Z Jeff Roofing, Inc.” Further, the claim of lien was signed by Agustin Exposito on behalf of “Z-Jeff Roofing, Inc.” Z Roofing, Inc. then filed a mechanic’s lien foreclosure action against View West Condominium Association [“the Association”], and on November 3, 2008, Z Roofing, Inc. obtained a final judgment against the Association, which was later amended. The final judgment included, among other units, the condominium unit encumbered by the mortgage executed by Aponte and involved in the underlying mortgage re-foreclosure action (“subject property”).

After the final judgment was entered in favor of Z Roofing, Inc., on March 6, 2009, the Plaintiff filed a residential foreclosure action against Aponte, the Association, and others, but failed to name Z Roofing, Inc. as a defendant. In February 2010, a final summary judgment of mortgage foreclosure was entered in favor of the Plaintiff and against the defendants.

After the Plaintiff obtained a final judgment in the mortgage foreclosure action, the subject property was sold at two separate foreclosure sales—the mechanic’s lien foreclosure sale and the mortgage foreclosure sale. First, the subject property was sold at the mechanic’s lien foreclosure sale on April 5, 2010 to “Z Roofing Inc.” The Clerk of the Circuit Court issued the Certificate of Title to “Z Roofing Inc.” on May 5, 2010, and it was recorded on May 12, 2010. Second, on

May 10, 2010, which was after the subject property was sold at the lien foreclosure sale to Z Roofing, Inc., but before the certificate of title was recorded, the subject property was sold at the mortgage foreclosure sale to the Plaintiff (FNMA). On May 21, 2010, the Clerk of the Circuit Court issued a Certificate of Title to FNMA for the subject property, and it was recorded on June 3, 2010.

In August 2016, the Plaintiff filed the underlying re-foreclosure action against “Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc.” The Plaintiff filed a motion for judicial default against “Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc.” for failure to answer the re-foreclosure complaint.

“Z Jeff Roofing, Inc.” then filed a Motion to Dismiss, asserting that “Z Roofing, Inc.” has not been separately named as a party, but is only named as an “n/k/a” alias of “Z Jeff Roofing Inc.” Further, the certificate of title issued in the mechanic’s lien foreclosure action does not suggest that “Z Jeff Roofing, Inc.” has or had a title interest in the property and the re-foreclosure complaint does not explain how “Z Jeff Roofing, Inc.” is or could be connected to the subject property. In its motion to dismiss, Z Jeff Roofing, Inc. argued that it is a separate entity and not an alias entity of Z Roofing, Inc., and that the Plaintiff has failed to state a cause of action against Z Jeff Roofing, Inc. and lacks personal jurisdiction over Z Jeff Roofing, Inc. Z Jeff Roofing, Inc. also filed an opposition to the Plaintiff’s motion for judicial default, noting that it had filed the motion to dismiss.

The trial court entered an order denying Z Jeff Roofing, Inc.'s motion to dismiss and ordered it to file an answer within twenty days. Z Jeff Roofing, Inc. filed its answer and affirmative defenses, arguing, in part, the same points asserted in its motion to dismiss.

The Plaintiff then filed a "Motion for Substitution of Party Defendant" pursuant to Florida Rule of Civil Procedure 1.260(c), seeking to substitute Z Roofing, Inc. for Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc. as the party defendant ("Motion for Substitution"). The Plaintiff asserted that following a diligent search, it has determined that "Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc." was the incorrect name of the party, and for marketable title purposes and to transfer the property at the conclusion of this action, the substitution was necessary. The Plaintiff also requested the entry of an order instructing the Clerk of the Court to issue the summons attached to the Motion for Substitution to Z Roofing, Inc., if the trial court grants the Motion for Substitution. The trial court granted the Plaintiff's Motion for Substitution and ordered the Clerk of the Court to issue the summons for Z Roofing, Inc.

Z Roofing, Inc. was served with the complaint and summons, and it filed its answer and affirmative defenses, asserting that the Plaintiff failed to state a cause of action; failed to join all lienholders; and incorrectly described Z Roofing, Inc. as an alias of a party that does not have a title interest in the subject property, and therefore,

the trial court does not have personal jurisdiction over Z Roofing, Inc. Z Roofing, Inc.'s answer was filed by the same attorney utilized by Z Jeff Roofing, Inc.

The Plaintiff moved for summary final judgment of re-foreclosure, asserting in part, that it obtained a final judgment of foreclosure and a certificate of title after its successful bid at the residential foreclosure action, but unbeknownst to the Plaintiff, Z Roofing, Inc. obtained a certificate of title from a subordinate action between Z Roofing, Inc. and the Association in the mechanic's lien foreclosure action. Further, the Association's interest had been adjudicated within the mortgage foreclosure action as having been inferior and subordinate to the Plaintiff's mortgage, and therefore, as a matter of law, any interest derived from the Association as to the subject property is similarly inferior and subordinate to the Plaintiff's mortgage. The motion for summary judgment also addressed the affirmative defenses, arguing as follows: "Contrary to the allegation that Plaintiff improperly included an alias name for Defendant, attached hereto is a copy of the Claim of Lien filed by 'Z-Roofing,' but executed by the president as 'Z-Jeff Roofing, Inc.'" The motion also asserted that Z Roofing, Inc. was served with the re-foreclosure complaint, but did not exercise its redemption rights. The motion also attached a copy of the Claim of Lien and copies of SunBiz corporate records for both "Z-Roofing, Inc." and "Z-Jeff Roofing, Inc." Both entities have the same address and registered agent, Agustin Exposito.

Z Roofing, Inc. opposed the motion for summary judgment, arguing, among other things, that “despite its recent substitution of parties, Z Roofing, Inc. is only named in Plaintiff’s current complaint as an ‘n/k/a alias’ of Z Jeff Roofing, Inc.” However, the certificate of title shows that Z Roofing, Inc. is the titleholder of the subject property, and there is no evidence that Z Jeff Roofing, Inc. has or had any interest in the subject property. Z Roofing, Inc. also argued as follows:

Z Roofing does not dispute that a claim of lien related to the subject property was executed by Z Roofing’s president, in his capacity as president of Z Jeff Roofing, Inc. But what is important herein, is that the actual title of the subject property is held by Z Roofing, Inc., and not Z Jeff Roofing, Inc. This is not a matter of aliases, since the two companies are not aliases of each other. . . . Z Roofing, Inc. and Z Jeff Roofing, Inc. are separate companies, . . . and the evidence in this case demonstrates, overwhelmingly, that the actual title of the subject property is held by Z Roofing, Inc. –and by no other separate Z Roofing entity. . . . Because Z Roofing, Inc. and Z Jeff Roofing, Inc. are not legally affiliated, the mistaken characterization of Z-Roofing, Inc. as an alias entity cannot be treated as a mere misnomer, and Z-Roofing, Inc. can only be included in the lawsuit if the complaint is amended and a separate summons properly served on Z-Roofing, Inc.

In support of its opposition to the motion for summary judgment, Z Roofing, Inc. submitted the sworn affidavit of its president, Agustin Exposito. In his sworn affidavit, Exposito stated that the certificate of title issued on May 5, 2010, which was attached to the Plaintiff’s re-foreclosure complaint, reflects that the title holder of the subject property is “Z Roofing Inc” and that the certificate of title does not reference “Z Jeff Roofing, Inc.” Further, Z Roofing, Inc.’s interest in the subject property was never transferred to Z Jeff Roofing, Inc.; Z Roofing, Inc. is not in any

way a successor to Z Jeff Roofing, Inc.; and Z Roofing, Inc. “is an entirely separate entity from Z Jeff Roofing, Inc. and not an alias entity, and there has never been any merger or name-change (or any similar transaction) that would allow [Z Roofing, Inc.] to be characterized as an alias or ‘n/k/a’ entity with respect to Z Jeff Roofing, Inc.” Z Roofing, Inc. also filed a “Motion That It Be Dropped as an Improperly Substituted Defendant.” Following a hearing, the trial court entered a summary final judgment of re-foreclosure in favor of the Plaintiff and against Z Roofing, Inc. This appeal followed.

II. STANDARD OF REVIEW

“Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.” Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). As such, we review the order entering final summary judgment de novo. See Soho Realty, LLC v. Alexander Condo. Ass’n, 282 So. 3d 953, 955 (Fla. 3d DCA 2019); Heylin v. Gulfstream Prop. & Cas. Ins. Co., 147 So. 3d 659, 661 (Fla. 5th DCA 2014).

III. ANALYSIS

In seeking to substitute Z Roofing, Inc. for “Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc.” as the party defendant, the Plaintiff sought substitution pursuant to rule 1.260, which permits for the substitution of a party based on four events that may arise after an action is commenced: (a) death of party; (b) incompetency of a

party; (c) transfer of a party's interest in the case; and (d) when a public officer dies or no longer holds office. It is undisputed that grounds (a), (b), and (d) are inapplicable in the instant case. Further, ground (c), which is set forth in rule 1.260(c),³ does not appear to be applicable. The instant case does not involve a situation where "Z Jeff Roofing Inc. n/k/a Z-Roofing, Inc." transferred its interest to Z Roofing, Inc. Rather, it appears that the Plaintiff may have filed the re-foreclosure action against the wrong party. The certificate of title issued in the mechanic's lien foreclosure action states that the property was sold to "Z Roofing Inc.," and it does not reference Z Jeff Roofing, Inc. As set forth in the affidavit filed by Z Roofing, Inc.'s president, Mr. Exposito, Z Roofing, Inc.'s interest in the subject property was never transferred to Z Jeff Roofing, Inc.; Z Roofing, Inc. is not in any way a successor to Z Jeff Roofing, Inc.; and Z Roofing, Inc. "is an entirely separate entity from Z Jeff Roofing, Inc. and not an alias entity, and there has never been any merger or name-change (or any similar transaction) that would allow [Z Roofing, Inc.] to be characterized as an alias or 'n/k/a' entity with respect to Z Jeff Roofing, Inc." Thus, we reverse the trial court's entry of final summary judgment in favor of the Plaintiff

³ Rule 1.260(c) provides:

Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

and against Z Roofing, Inc., and on remand, the lower tribunal is to address whether the re-foreclosure action was filed against the proper party.^{4, 5}

Reversed and remanded.

⁴ The general rule is that if it is later determined that a party was erroneously substituted under rule 1.260(c), “that party may be dropped upon the motion of a party or by order of the court on its own initiative.” Metcalf v. Lee, 952 So. 2d 624, 630 n.2 (Fla. 4th DCA 2007).

⁵ Z Roofing, Inc. contends that, instead of moving for substitution pursuant to rule 1.260(c), the Plaintiff should have moved to add a new party under Florida Rule of Civil Procedure 1.250(c) because Z Roofing, Inc. is a completely different entity than Z Jeff Roofing, Inc. On remand, the parties may address this argument with the trial court.