Third District Court of Appeal

State of Florida

Opinion filed December 2, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-0987
Lower Tribunal No. 16-13429

Magela Belson, et al.,
Appellants,

vs.

Jeffrey A. Miller, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Warren Gammill & Associates, P.L., and Warren P. Gammill, for appellants.

Bruce S. Rogow, P.A., and Bruce S. Rogow and Tara A. Campion (Fort Lauderdale); Weinstein Law, P.A., and Morgan L. Weinstein (Fort Lauderdale), for appellees.

Before LOGUE, HENDON and LOBREE, JJ.

PER CURIAM.

Magela Belson (the "client") and Sarah Ann Belson, Michael Belson, and

Christine Belson appeal from the lower court's order denying their motion for leave to amend, striking all but one of their complaint's counts as a sham, and entering final summary judgment in favor of Jeffrey A. Miller ("Miller") and Alexandra Rodriguez ("Rodriguez") on all but the remaining count. We reverse and remand for further proceedings.

We review a lower court's ruling on a motion to strike pursuant to Florida Rule of Civil Procedure 1.150 for abuse of discretion. See Upland Dev. of Cent. Fla., Inc. v. Bridge, 910 So. 2d 942, 944 (Fla. 5th DCA 2005) ("In ruling upon a motion to strike, the trial court must resolve all doubts in favor of the pleading; thus, on review, where there is no showing that a pleading was plain fiction or undoubtedly false, the pleading must be reinstated.").

The motion was not verified as required by rule 1.150 and section 92.525(2), Florida Statutes (2019). It is undisputed that the hearing on it was neither noticed, nor held as an evidentiary hearing, despite the clear due process requirement that all three things be the case. See Miller v. Nelms, 966 So. 2d 437, 440 (Fla. 2d DCA 2007) (rejecting notion that, absent stipulation of parties, court could rule on motion to strike complaint as sham by merely examining it, and reversing because court was required to hold full evidentiary hearing and give opportunity to offer evidence on whether complaint alleged false cause of action); Herranz v. Siam, 2 So. 3d 1105, 1107 (Fla. 3d DCA 2009) (reversing grant of 1.150 motion to strike complaint as

sham where hearing was not properly noticed as evidentiary hearing); Furst v. Blackman, 744 So. 2d 1222, 1224 (Fla. 4th DCA 1999) (concluding reversal required by procedural deficiencies, including unverified motion to strike, and noting "affidavit filed in conjunction with another motion is not a substitute for a verified motion to strike"). As affidavits cannot substitute for the testimony and other documentary evidence that an evidentiary hearing requires, see Reyes ex rel. Barcenas v. Roush, 99 So. 3d 586, 589 (Fla. 2d DCA 2012) (reversing grant of 1.150 motion because neither argument of counsel nor affidavits substitute for evidentiary hearing), the finding of falsity in any of the complaint's allegations in the order on review was not supported by competent, substantial evidence.

Because summary judgment for both defendants was pursuant to (and only as authorized by) rule 1.150, rather than rule 1.510, reversal is required on the basis of the procedural defects in the proceedings below. See Scarfone v. Silverman, 408 So. 2d 778, 781 (Fla. 2d DCA 1982) (reversing grant of 1.150 motion and summary judgment pursuant to it on basis that record showed triable issues, noting case was "not the kind . . . that rule 1.150 was designed to cover"). We express no view on the merits of Miller's motion to strike. See Chiu v. Wells Fargo Bank, N.A., 242 So. 3d 461, 464 n.2 (Fla. 3d DCA 2018) (reversing summary judgment for failure to conduct hearing as required by rule and declining to address merits).

We also reverse that portion of the order sua sponte striking or dismissing all counts against Rodriguez and entering summary judgment in her favor. Her only pending motion to dismiss was not noticed for hearing that day, and the lower court granted her relief as a result of the perceived merits of Miller's improperly heard motion to strike, adjudicated first. Cf. Pacheco v. Wasserman, 701 So. 2d 104, 106 (Fla. 3d DCA 1997) ("Assuming, without deciding, that a trial court may strike a pleading as a sham on its own motion, the failure to conduct an evidentiary hearing under Rule 1.150 is nonetheless an abuse of discretion.").

The portion of the lower court's order denying the client's motion for leave to amend also must be reversed. Both its face and the transcript of the proceedings make clear that the court's sole rationale was its finding that Miller's motion to strike was meritorious and not mooted by the proposed amendment. Because the rule 1.150 proceedings were so flawed, we vacate the denial of the client's motion for leave to amend without reaching its merits and expressing no view of how the trial court should rule on remand. Compare Diamond v. Diamond, 536 So. 2d 1092, 1092 (Fla. 4th DCA 1988) (reversing grant of 1.150 motion and noting that, "[t]his opinion is not rendered on the merits nor do we decide whether leave to amend the pleadings should have been permitted."), with Motyczka v. Hall, 706 So. 2d 959, 959 (Fla. 3d DCA 1998) (reversing grant of 1.150 motion for lack of evidentiary hearing and noting, "On remand, the parties shall be entitled to a new hearing on the

motion to dismiss for failure to state a cause of action. If that motion is granted, in whole or in part, plaintiff is entitled to have leave to amend."). Finding that the trial court abused its discretion, we vacate the order in its entirety and remand for further proceedings consistent herewith. See Roush, 99 So. 3d at 591.

Reversed and remanded with instructions.