

Third District Court of Appeal

State of Florida

Opinion filed September 23, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D20-04; 3D20-03
Lower Tribunal No. 17-2349

Samuel Oshana and Giangi Ratto,
Appellants,

vs.

Carmelo Destefano Lopiano, et al.,
Appellees.

Appeals from non-final orders from the Circuit Court for Miami-Dade County, Beatrice Butchko, Judge.

Granados Davey Alwine, LLP, and Robert J. Alwine, II, for appellants.

ADR Miami LLC, and Juan Ramirez, Jr.; Bared & Associates, P.A., and Susan Granoff, for appellees.

Before SCALES, MILLER and GORDO, JJ.

PER CURIAM.

Samuel Oshana and Giangi Ratto (collectively, “Appellants”) appeal a non-final order denying their verified motion to set aside default and vacate final judgment pursuant to Florida Rule of Civil Procedure 1.540(b). Appellants claim they demonstrated excusable neglect in failing to answer the complaint and that service against Ratto was improper.¹ We have jurisdiction. See Fla. R. App. P. 9.130(a)(5). We conclude the trial court was required to hold an evidentiary hearing prior to making findings on Appellants’ motion. We, therefore, reverse and remand for further proceedings.

Following entry of default judgments, Appellants filed a motion to vacate alleging their failure to respond to the complaint was a result of their attorney’s excusable neglect. Ratto further alleged he had never been personally served and

¹ Appellants also argue that since the damages awarded in the final judgments are unliquidated, the trial court should have required proper notice and conducted an evidentiary hearing prior to entering the judgments. If, on remand, after conducting the evidentiary hearing, the trial court grants Appellants’ rule 1.540(b) motion on the excusable neglect issue, such an adjudication will necessarily result in the vacatur of the final judgments, therefore mooting Appellants’ argument regarding the damages portion of the final judgments. If, however, on remand, after conducting the evidentiary hearing, the trial court denies Appellants’ rule 1.540(b) motion, the trial court’s resulting order should, nevertheless, vacate the damages portion of the final judgments and set that matter for hearing as required by Rule 1.440. See Rodriguez-Faro v. M. Escarda Contractor, Inc., 69 So. 3d 1097, 1098 (Fla. 3d DCA 2011) (holding that a default judgment awarding unliquidated damages is void if defendant not provided proper notice and an opportunity to be heard).

the judgment was therefore void. Appellants filed affidavits in support of their motion.²

After an initial hearing on the motion, the trial court requested that Appellants obtain an affidavit from the attorney whose conduct was allegedly excusable. Appellants obtained the attorney's affidavit and filed it for the trial court's consideration along with additional supporting affidavits from Appellants.

Although we review a trial court's ruling on motions for relief from judgment for an abuse of discretion,³ once a party moving under rule 1.540(b) raises a colorable entitlement to relief exercising that discretion requires holding an evidentiary hearing. See Rinconcito Latino Cafeteria, Inc. v. Ocampos, 276 So. 3d 525, 527 (Fla. 3d DCA 2019) (quoting Bayview Loan Servicing, LLC v. Dzidzovic, 249 So. 3d 1265, 1267–68 (Fla. 2d DCA 2018)); see also S.E. Termite & Pest v. Ones, 792 So. 2d 1266, 1268 (Fla. 4th DCA 2001) (“[W]here the contents of an affidavit supporting a defendant’s contention of insufficiency of service would, if true, invalidate the purported service and nullify the court’s personal jurisdiction over the defendant, the trial court should hold an evidentiary hearing before deciding the issue.” (citations omitted)).

² We find that the affidavits on their face raise a colorable entitlement to relief as to the issues of excusable neglect and service of process.

³ Noel v. James B. Nutter & Co., 232 So. 3d 1112, 1115 (Fla. 3d DCA 2017).

While Appellants submitted affidavits and the trial court heard the argument of counsel, the court did not hold an evidentiary hearing on the issues of service of process and excusable neglect prior to making findings and denying Appellants' motion. See Avi–Isaac v. Wells Fargo Bank, N.A., 59 So. 3d 174, 177 (Fla. 2d DCA 2011) (“[N]either the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing.” (quoting Sperdute v. Household Realty Corp., 585 So. 2d 1168, 1169 (Fla. 4th DCA 1991))). Accordingly, we reverse the order denying Appellants' motion and “remand for the trial court to hold an evidentiary hearing.” Novastar Mtg., Inc. v. Bucknor, 69 So. 3d 959, 960 (Fla. 2d DCA 2011). “We note that nothing in this opinion should be construed as a determination on the merits of the claims raised in [Appellants'] rule 1.540(b) motion.” Id.

Reversed and remanded.