Third District Court of Appeal

State of Florida, July Term, A.D., 2012

Opinion filed September 27, 2012.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-2881
Lower Tribunal No. 09-67986

Jose Cardoza and Continental Heritage Insurance Company,
Appellants,

vs.

The State of Florida, for the use and benefit of the State, by the Clerk of the Court,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Jerald Bagley, Judge.

David S. Molansky, for appellants.

Bilzin Sumberg Baena Price & Axelrod and Eileen Ball Mehta and Alexandra L. Deas, for appellee.

Before ROTHENBERG, LAGOA, and EMAS, JJ.

LAGOA, J.

Jose Cardoza ("Cardoza") and Continental Heritage Insurance Company ("Continental") (collectively, "Appellants"), appeal an Order Denying Surety's Motion to Vacate Judgment. For the following reasons, we reverse.

I. FACTUAL AND PROCEDURAL HISTORY

On June 22, 2009, Cardoza was arrested and charged with several offenses. On June 23, after making his first court appearance, Cardoza was released from custody upon posting a $5000 appearance bond; Dade County Bail Bond was the surety agent for Continental.[1] Upon Cardoza's failure to appear at the July 13 arraignment, the trial court issued an alias capias and forfeited the bond. On July 14, the Clerk of the Circuit Court notified the surety agent and Continental that the bond was forfeited.

On August 6, Cardoza was stopped for a traffic offense in Miami-Dade County. As a result of that stop, Cardoza was arrested and transported to the Turner Guilford Knight Pre-Trial Detention Center. The next day, August 7, Cardoza pled guilty to the charge pertaining to the bond. The trial court withheld adjudication and sentenced Cardoza to probation. The case was then closed. Contrary to section 903.26(8), Florida Statutes (2009), however, the Clerk did not discharge the forfeiture of the bond.

Instead, on September 15, the Clerk entered a final judgment of bail forfeiture against Continental for $5000, plus costs and interest, pursuant to section 903.27(1), Florida Statutes (2009). Shortly thereafter, Continental and Dade

[1] The surety agent posted a separate bond for each offense; the bond at issue is number PC700816492.

County Bail Bond filed a motion to vacate the judgment, arguing, *inter alia*, that the Clerk erroneously sent the forfeiture to final judgment. In its response, the Clerk objected to vacating the judgment and asserted that Continental was required to deposit the judgment amount in escrow if it wished to vacate the judgment. See § 903.27(5), Fla. Stat. (2009).[2] The trial court denied the motion to vacate and this appeal ensued.

II. ANALYSIS

On appeal, Appellants contend that the trial court erred in ruling that the surety must pay the judgment amount in escrow, as the Clerk acted outside its authority in failing to discharge the forfeiture and sending the forfeiture to judgment. Additionally, Appellants assert that the judgment is void and they were not required to pay the judgment amount in escrow. We agree.

Because forfeitures are not favored, "the statutory prerequisites established by the legislature for the orderly estreature and collection of bail bonds are to be 'mandatorily followed.'" Ferlita v. State, 380 So. 2d 1118, 1119 (Fla. 2d DCA 1980) (quoting Ramsey v. State, 225 So. 2d 182, 189 (Fla. 2d DCA 1969)). In

[2] At oral argument, the Clerk conceded that it would have agreed to set aside the judgment if appellants had sought relief under Florida Rule of Civil Procedure 1.540(b) rather than through a motion to vacate a judgment. As stated in Kash N'Karry Wholesale Supermarkets, Inc. v. Garcia, 221 So. 2d 786, 789 (Fla. 2d DCA 1969), "it is apparent that [Appellant] was in the right church but in the wrong pew; in other words, [Appellant] alleged potentially meritorious grounds under one motion where [they] should have alleged them in the other."

some circumstances, the failure to abide by the statutory scheme results in the issuance of a void judgment. Indeed, in Overholser v. Overstreet, 383 So. 2d 953, 954 (Fla. 3d DCA 1980), this Court held that "[t]he clerk's authority is entirely statutory and his official action, to be binding upon others, must be in conformity with the statutes." This Court further held that the Clerk's failure to track the requirements of a statute rendered its premature entry of a default void and subject to collateral attack. Id. In reaching this conclusion, this Court quoted the Florida Supreme Court's decision in Kroier v. Kroier, 116 So. 753, 756 (Fla. 1928):

> [W]here a special statutory authority or jurisdiction, which is more of a ministerial than of a judicial nature, is conferred upon the clerk of the court to render judgments which when lawfully entered become the judgments of the court, the statutory conditions precedent to the exercise of such authority must exist in order to legalize its exercise.

Overholser, 383 So. 2d at 954.

Here, the statutory condition to the exercise of the Clerk's authority to send the forfeiture to judgment did not exist. Section 903.26(8) provides, in pertinent part:

> If the defendant is arrested and returned to the county of jurisdiction of the court prior to judgment, the clerk, upon affirmation by the sheriff or the chief correctional officer, shall, without further order of the court, discharge the forfeiture of the bond. However, if the surety agent fails to pay the costs and expenses incurred in returning the defendant to the county of jurisdiction, the clerk shall not discharge the forfeiture of the bond.

Pursuant to section 903.26(8), therefore, the Clerk was required "without further order of the court [to] discharge the forfeiture of the bond" if the following acts occurred: (1) the defendant's arrest and return to the county of jurisdiction of the court prior to judgment; (2) affirmation by the sheriff or the chief correctional officer of the arrest and return; and (3) payment by the surety agent of any costs or expenses in returning the defendant to the county of jurisdiction. See Mike Snapp Bail Bonds v. Orange Cnty., 913 So. 2d 88, 92 (Fla. 5th DCA 2005) ("If [defendant] was returned before the judgment, then under subsection (8), the clerk should have, without further order of the court, discharged forfeiture of the bond. All conditions of that subsection had also been met: payment of costs; arrest and return of the defendant.").

It is undisputed that, prior to judgment on the forfeiture, Cardoza was re-arrested in Miami-Dade County (the same county of jurisdiction as the court). It is further undisputed that no costs or expenses were incurred in returning Cardoza to the county of jurisdiction prior to the judgment as he was rearrested in Miami-Dade County. Moreover, the Clerk never raised below any claim that the Appellants failed to provide an affirmation by the sheriff or the chief correctional officer. The sole basis of the Clerk's opposition to the return of the bond was that Appellants were required to deposit the judgment amount in escrow before the trial court could vacate the judgment. In essence, the Appellants have been penalized

for two errors committed by the Clerk: (1) the initial error in failing to discharge the bond as required by section 903.26(8); and (2) the subsequent error in sending the forfeiture of the bond to final judgment.

As in Overholser, the Clerk had no statutory authority to send the forfeiture to final judgment, and the premature judgment "entered by the clerk was void and subject to collateral attack." Id. at 954; see also Mike Snapp Bail Bonds, 913 So. 2d at 92 (holding that the clerk's forfeiture judgment, which was issued after clerk did not discharge bond forfeiture, was void and contrary to law; "[i]f a clerk acts prematurely, the judgment entered is not merely voidable"); Ferlita, 380 So. 2d at 1118-1119. When "it is determined that the judgment entered is void, the trial court has no discretion, but is obligated to vacate the judgment." Horton v. Rodriguez Espaillat Y Asociados, 926 So. 2d 436, 437 (Fla. 3d DCA 2006) (quoting State Dep't of Transp. v. Bailey, 603 So. 2d 1384, 1386-87 (Fla. 1st DCA 1992)).

Accordingly, because the statutory conditions precedent to the exercise of the Clerk's authority to enter a final judgment did not exist, the judgment entered by the Clerk is void. We, therefore, find that the trial court erred in denying

Appellants' motion to vacate the judgment, and we remand for the trial court to vacate the judgment and enter an order discharging the bond.[3]

Reversed and remanded.

ROTHENBERG, J., concurs.

[3] In a supplemental filing with the Court, the Clerk advised this Court that "[i]f the Court remands this matter to the trial court and authorizes the trial court to proceed without requiring the Appellants to pay into escrow the amount of the judgment as otherwise required by Section 903.27(5), the procedural objection previously raised by the Clerk will be obviated . . . . [and] the Clerk stipulates that he does not and will not object to the entry of an order vacating the Final Judgment on such remand."

EMAS, J., dissenting.

I do not take issue with the fact that the clerk made a mistake in failing to discharge the forfeiture and in entering a final judgment of forfeiture. Nor do I take issue with the fact that, ultimately and on the merits, Appellants are entitled to have the judgment vacated. However, these are not the issues before this Court. The singular issue before this Court is simply this: Whether Appellants were required to comply with the mandatory provisions of section 903.27(5) before obtaining the relief sought in the trial court.[4] To me, the answer is as clear and unequivocal as the language of the statute itself, and for that reason I must respectfully dissent from the majority's opinion.

Section 903.27(5), Florida Statutes (2009), provides:

> After notice of judgment against the surety given by the clerk of the circuit court, the surety or bail bond agent may within 35 days file a motion to set aside the judgment or to stay the judgment. It shall be a condition of any such motion and of any order to stay the judgment

[4] The majority points out that the clerk conceded that ultimately, Appellants would be entitled to a vacation of the judgment. This is beside the point. The issue presented is one of statutory construction, which we review *de novo*, and the ultimate merits of the underlying motion are not pertinent here. However, because this issue was raised in the majority opinion, it should also be pointed out that appellee made it clear that this case was being litigated not in bad faith but out of concern for the unintended consequences of agreeing that a surety could seek vacation of a judgment under section 903.27(5) without complying with the mandatory provisions of that statute.

> that the surety pay the amount of the judgment to the clerk, which amount shall be held in escrow until such time as the court has disposed of the motion to set aside the judgment. The filing of such a motion, when accompanied by the required escrow deposit, shall act as an automatic stay of further proceedings, including execution, until the motion has been heard and a decision rendered by the court.

(Emphasis added).

This Court has held that "[o]nce a forfeiture has been reduced to judgment . . . section 903.27, Florida Statutes (1985), exclusively governs the setting aside of a judgment." State for Use & Benefit of Metro. Dade Cnty. v. Quesada, 529 So. 2d 792, 793 (Fla. 3d DCA 1988) (citing Resolute Ins. Co. v. State, 289 So. 2d 456 (Fla. 3d DCA 1974)). Appellants acknowledged as much, citing section 903.27 in their motion filed in the circuit court. While doing so, however, they failed to comply with a requisite condition of that statute. The majority's conclusion that the judgment in this case is "void" is beside the point. The statutory language of section 903.27(5) is plain, unequivocal and mandatory: Any motion seeking to set aside a judgment under this section (even a void judgment), and any order to stay such judgment, requires that it "shall be a condition" that the surety "pay the amount of the judgment to the clerk, which amount shall be held in escrow until such time as the court has disposed of the motion to set aside the judgment." § 903.27(5), Fla. Stat.

Therefore, whether the gravamen of the motion to vacate is that the judgment is void, voidable, or otherwise subject to vacation, the statutory condition of payment of the amount of the judgment must be met before the circuit court has the authority to consider the merits of the motion.[5]

The majority has, in effect, construed this mandatory language as inapplicable to a void judgment. The statute, however, provides no such exception, and the majority's insertion of one renders the statute unworkable, as it puts the proverbial cart before the horse: for example, until the circuit judge decides whether a judgment is "void" (as opposed to "voidable"), a surety would act at its own peril filing a motion under section 903.27(5) without placing in escrow with the clerk the amount of the judgment. If no payment of the judgment accompanies the filing of the motion, and the circuit court determines the judgment is not void, then the surety has violated the mandatory language of the statute and the court may not consider the remaining merits of the motion.[6] The majority's

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[5] Appellee contends that the requirement of payment of the judgment is jurisdictional in nature, analogizing it to a time limitation within which to file a motion to vacate a final judgment. I do not believe it necessary to reach this question.

[6] Moreover, the plain language of section 903.27(5) requires payment of the judgment not only as a condition of the filing of the motion, but as a condition of "any order to stay the judgment." (Emphasis added). Therefore, even if the trial court could consider the merits of the motion (in the absence of an accompanying payment of the judgment), it would be prohibited from entering a stay while the motion remains pending. By contrast, the filing of the motion, accompanied by

holding likely would require the trial court to bifurcate the motion to vacate, first deciding whether the underlying judgment is "void" (and thereby requiring no payment of the judgment at the time the motion is filed) or "voidable" (and thereby requiring payment of the judgment, subjecting the motion to being stricken or dismissed for failure to comply with section 903.27(5)). The statute makes no such distinction, and engrafting one violates a fundamental canon of statutory construction: "When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." Daniels v. Fla. Dep't of Health, 898 So. 2d 61, 64 (Fla. 2005).

The majority's reliance on Mike Snapp Bail Bonds v. Orange County, 913 So. 2d 88 (Fla. 5th DCA 2005), is misplaced. In Mike Snapp, the surety initially filed a motion to set aside a forfeiture (pursuant to sections 903.26 and 903.28), not a motion to vacate a final judgment. The surety contended that the forfeiture (as in this case) was improperly entered by the clerk. The trial court denied the motion to set aside the forfeiture, and the surety then filed a motion to set aside the final judgment, pursuant to section 903.27. Significantly, the surety, at the time it filed the motion, paid the amount of the judgment into the court as required under section 903.27(5). Thus, the surety in Mike Snapp complied with the very same

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payment of the judgment, operates as an automatic stay of the judgment, including execution, until the final disposition of the motion.

statutory requirement from which appellants claim (and the majority agrees) they are exempt. Ultimately, the Fifth District held that the trial court erred in failing to grant relief once the surety had satisfied this requirement: "Had the circuit court denied relief initially because Snapp failed to pay the judgment, it should have granted a proper remedy on rehearing when Snapp timely paid the forfeited bond within the 35 days specified by section 903.27." Id. at 92. Had Appellants complied with the statutory procedure like the surety in Mike Snapp, they would, like the surety in Mike Snapp, be entitled to relief.[7] Their failure to do so, however, is fatal to their appeal.

I would affirm the trial court's order denying relief.

[7] And, had Appellants placed the amount of the judgment in escrow with the clerk, they would, like the surety in Mike Snapp, be entitled to a return of those monies, with interest at the legal rate. Id. at 93.