

Third District Court of Appeal

State of Florida, July Term, A.D. 2013

Opinion filed December 18, 2013.
Not final until disposition of timely filed motion for rehearing.

No. 3D13-128
Lower Tribunal No. 09-77359

**US Bank National Association as Trustee for WaMu Mortgage Pass
Through Certificates for WMalt Series 2007-OA7,**
Petitioner,

vs.

Gladys Rivera and Dennis Rivera,
Respondents.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Rosa I. Rodriguez, Judge.

GrayRobinson, P.A., and Thomas H. Loffredo, Terrance W. Anderson, Jr., and Jeffrey T. Kuntz, for petitioner.

The Stabenow Law Firm, PLLC, and Tony L. Stabenow, for respondents.

Before LAGOA, SALTER and LOGUE, JJ.

LOGUE, J.

Petitioner seeks a writ of certiorari to quash two discovery orders, entered on December 12, 2012 and January 9, 2013, respectively. Respondents had moved to vacate a final judgment on two grounds: improper service and fraud upon the court by the Petitioner's prior lawyers.¹ The requested discovery related to the claim of fraud and was intended to support Respondent's argument that the case should be dismissed with prejudice. We grant the writ and quash the two orders for the following reasons.

First, the discovery orders on review pertain to the production of materials that are protected by the attorney-client and other privileges, and, contrary to Respondent's arguments, these privileges have not been waived. Prieto v. Union Am. Ins. Co., 673 So. 2d 521, 523 (Fla. 3d DCA 1996) (citing Smith v. Armour Pharm. Co., 838 F. Supp. 1573, 1576 (S.D. Fla. 1993)) (holding that the waiver of the attorney-client privilege must be intentional).

Second, discovery conducted after a final judgment has been entered and pursuant to a motion to vacate will normally be permitted only if the motion is supported by sworn proof of the allegations contained therein. Rooney v. Wells Fargo Bank, N.A., 102 So. 3d 734, 736 (Fla. 4th DCA 2012) ("We do not think that discovery can commence on a motion for relief from judgment based upon unsworn allegations."). Respondents here have failed to satisfy this burden. The

¹ Prior to Respondent's motion, Petitioner, by its new counsel, itself moved to vacate the final judgment entered in its favor.

requested discovery related to the claim of fraud, but only the allegations with respect to the insufficiency of the service were supported by sworn proof. We, therefore, grant the petition for writ of certiorari and quash the orders under review.