

IN THE THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

Case Number
3D10-2910

TIMOTHY PHILLIPS,

v.

CENTENNIAL BANK F/K/A
MARINE BANK,

Appellant,

Appellee.

Appeal from the Circuit Court of the Sixteenth Judicial Circuit, in and for
Monroe County, Florida

Case Number in Lower Tribunal
2009-CA-397-M

Initial Brief of Timothy Phillips

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TABLE OF CONTENTS

TABLE OF CITATIONS -----	2
Statement of the Case and of the Facts-----	4
Summary of Argument -----	6
Standard of Review -----	7
Argument -----	7
I. THE LOWER COURT HAD NO AUTHORITY TO ENTER THE AMENDED FINAL DEFICIENCY JUDGMENT. -----	7
a. The Appellee failed to file a proper motion to amend the September 10, 2010 Final Deficiency Judgment. -----	8
b. The trial court did not have authority to amend the Final Deficiency Judgment under Rule 1.540(a). -----	9
c. The lower court could not amend the Final Deficiency Judgment pursuant to Rule 1.540(b). -----	11
II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT WHERE IT MADE NO FINDING OF LIABILITY AGAINST THE APPELLANT. -----	13
Conclusion-----	14
Certificate of Service-----	15
Certificate of Compliance -----	15

TABLE OF CITATIONS

CASES

Harbor Bay Condominiums v. Basabe, 856 So.2d 1067 (Fla. 3d DCA 2003)	6, 7
Izaak walton Investors, LLC v. Oesterle, 51 So.2d 612 (Fla. 1st DCA 2011)	7
Kippy Corp. v. Colburn, 177 So.2d 193 (Fla. 1965)	8
Malone v. Percival, 875 So.2d 1286 (Fla. 2d DCA 2004)	10
McCrea v. Deutsche National Trust Company, 993 So.2d 1057 (Fla. 2d DCA 2008)	11
Meckler v. Weiss, 80 So.2d 608 (Fla. 1955)	14
Metcalf v. Lee, M.D., 952 So.2d 624 (Fla. 4th DCA 2007)	7
Moforis v. Moforis, 977 So.2d 786 (Fla. 4th DCA 2008)	10
Peters v. Peters, 479 So.2d 840 (Fla. 1st DCA 1985)	6
Schaeffler v Deych, 38 So.2d 796 (Fla. 4 th DCA 2010)	7
Shaw v. Charter Bank, 576 So.2d 907 (Fla. 1 st DCA 1991)	13
YEMC Construction & Development v. Inter Ser 884 So.2d 446 (Fla. 3d DCA 2004)	8
Youth for Christ of Sarasota, Inc. v. Sarasota Souny, 765 So.2d 794 (Fla. 2d DCA 2000)	12

RULES

F.R.C.P. 1.530(d)	8
F.R.C.P. 1.530(g)	6, 8
F.R.C.P. 1.540(a)	9
F.R.C.P. 1.540(b)	11

All references to the record in this brief shall be made after the respective sentence with the citation (R.____).

INITIAL BRIEF

Statement of the Case and of the Facts

This is an appeal of an Amended Deficiency Judgment issued by the lower Court on September 24, 2010. On or about September 2, 2009, the Appellee, Centennial Bank f/k/a Marine Bank (“Centennial”), filed suit against the Appellant Timothy Phillips in the Circuit Court of Monroe County, Florida to foreclose a mortgage held by Centennial.¹ (R. 1-61) The mortgage encumbered the property located at 1 Sandpiper Lane, Marathon, Florida 33050 (“Property”). Centennial ultimately obtained Final Judgment of Foreclosure against the Appellant on January 28, 2010. (R. 147-152) The lower Court entered an Amended Final Judgment of Foreclosure on March 22, 2010, which appears only to have changed the sale date to April 27, 2010. (R. 155-160) Both the Final Judgment of Foreclosure and the Amended Final Judgment of Foreclosure contain the following language in paragraph 15:

The Court does not determine at this time whether defendants are personally liable for damages under the note sued on, and therefore this judgment is without prejudice to defendants’ asserting any defenses to liability for damages on the note should plaintiff subsequently file a motion for deficiency judgment.

¹ John B. Phillips, II and Lance E. Stehman were also named as individual defendants in the case below. However, John B. Phillips, II and Lance E. Stehman have not appealed the lower Court’s judgment.

(R. 149, 157, 160)

Centennial purchased the property at auction on April 27, 2010, and the clerk of court issued a certificate of title on May 7, 2010. (R. 161-166) Centennial filed a motion for deficiency judgment on June 18, 2010. (R. 167-189) On September 10, 2010, the lower Court signed a Final Deficiency Judgment. (R. 216-217) The amount of the Final Deficiency Judgment was \$216,485.73. (R. 216-217) Without any intervening motions to amend or stating any reason for doing so, the Court signed an Amended Final Deficiency Judgment on September 24, 2010.² (R. 218-219) The Amended Final Deficiency Judgment increased the amount of the judgment to \$529,630.64. (R. 218-219) Neither the Deficiency Judgment nor the Amended Final Deficiency Judgment made any findings of fact or conclusions of law as to the basis of the Appellant's personal liability. (R. 216-219) Additionally, the Deficiency Judgment and the Amended Final Deficiency Judgment only mention Timothy Phillips and Lance Stehman and exclude John B. Phillips, II. (R. 216-219)

Appellant files this appeal challenging the propriety of the Amended Final Deficiency Judgment on the grounds discussed below.

² The Appellee engaged in ex parte communications with the lower court prior to entry of the Amended Final Deficiency Judgment, which apparently prompted the Amended Final Deficiency Judgment. The communication is not part of the record on appeal.

Summary of Argument

The trial court erred in entering the Amended Final Deficiency Judgment. After issuing the original Deficiency Judgment on September 10, 2010, the trial court lost jurisdiction to amend the judgment absent a rule or statute providing otherwise. Harbor Bay Condominiums v. Basabe, 856 So.2d 1067, 1069 (Fla. 3d DCA 2003). Rule 1.530(g) of the Florida Rules of Civil Procedure provides that amending a judgment is accomplished by serving a motion “not later than 10 days after entry of the judgment.” F.R.C.P. 1.530(g) Here, no motion to amend was filed within ten days of the first deficiency judgment, and the plain language of Rule 1.530(g) does not provide for the lower Court to amend a judgment *sua sponte*. While a trial Court has the ability to correct a clerical error in a judgment under Rule 1.540(a) of the Florida Rules of Civil Procedure, an increase in the amount of a judgment is not a clerical mistake. *See Peters v. Peters*, 479 So.2d 840, 841 (Fla. 1st DCA 1985). Accordingly, the lower Court had no jurisdiction or basis to enter the Amended Final Deficiency Judgment.

The Final Judgment of Foreclosure, the Amended Judgment of Foreclosure, the Final Deficiency Judgment, and the Amended Final Deficiency Judgment do not provide any findings of fact or conclusions of law to support a personal judgment against the Appellant. (R. 147-152, 155-

160, 216-219) Rather, The lower court departed from the essential elements of law when it entered a personal judgment against the Appellant without specifying the basis for the judgment. (R. 216-219) Accordingly, the Amended Final Deficiency Judgment is deficient and must be reversed.

Standard of Review

This appeal involves the construction and operation of the Florida Rules of Civil Procedure. The standard of review cases involving construction of procedural rules is *de novo*. See Schaeffler v Deych, 38 So.2d 796 (Fla. 4th DCA 2010), Metcalf v. Lee, M.D., 952 So.2d 624 (Fla. 4th DCA 2007), Izaak Walton Investors, LLC v. Oesterle, 51 So.2d 612 (Fla. 1st DCA 2011).

Argument

I. THE LOWER COURT HAD NO AUTHORITY TO ENTER THE AMENDED FINAL DEFICIENCY JUDGMENT.

This Court in Harbor Bay Condominiums v. Basabe, 856 So.2d 1067, 1069 (Fla. 3d DCA 2003) held that “A trial court does not retain the authority to amend or modify a final judgment, absent a rule or statute providing otherwise.” This Court further stated that “Unless a proper motion or petition is filed within the allotted time the order becomes absolute and except as provided by the rules... the trial court has no authority to alter, modify, or vacate the substance of the order.” Id at 1070

(quoting Kippy Corp. v. Colburn, 177 So.2d 193, 196-197 (Fla. 1965)); see also YEMC Construction & Development v. Inter Ser, 884 So.2d 446, 448 (Fla. 3d DCA 2004).

Here, the trial Court signed a Final Deficiency Judgment on September 10, 2010 against the Appellant. (R. 216-217) The Harbor Bay case instructs that absent a proper motion to amend the September 10, 2010 Judgment becomes absolute and unamendable. There exist three rules that may be utilized to amend a final judgment. A final judgment may be modified under Rules 1.530(g), 1.540(a), and 1.540(b). The lower court and appellee failed to utilize any of these rules to modify the Final Deficiency Judgment. Each method is discussed further below.

a. The Appellee failed to file a proper motion to amend the September 10, 2010 Final Deficiency Judgment.

The Appellee failed to file a proper motion to amend the Final Deficiency Judgment. Rule 1.530(g) provides the method for amending a judgment stating, “A motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment.” F.R.C.P. 1.530(g). Rule 1.530(g) allows for such an amendment only *after* a motion to amend is served; It does not provide for an amendment absent such a motion and does not allow the court to act *sua sponte*. Id.; compare to F.R.C.P. 1.530(d)

(specifically allowing the court to order a rehearing or new trial within 10 days) and F.R.C.P. 1.540(a) (allowing a court to make corrections for clerical error). Here, Centennial did not serve or file any motion to amend the Final Deficiency Judgment. Accordingly, the Appellee failed to serve a proper motion to amend the September 10, 2010 judgment, as is required under Rule 1.530(g). Harbor Bay instructs that, absent such a motion, the lower court did not have any authority to enter the Amended Final Deficiency Judgment.

b. The trial court did not have authority to amend the Final Deficiency Judgment under Rule 1.540(a).

The trial court did not have authority to amend the Final Deficiency Judgment under Rule 1.540(a), which may be utilized only to correct clerical errors. Rule 1.540(a) provides: “Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders.” F.R.C.P. 1.540(a). An increase in the amount of a judgment is not considered a clerical error as contemplated in Rule 1.540(a). “‘Clerical mistakes’ referred to by Rule 1.540(a) are only ‘errors or mistakes arising from accidental slip or omission, and **not errors or mistakes in the**

substance of what is decided by the judgment or order.’’ (emphasis supplied) Malone v. Percival, 875 So.2d 1286, 1288 (Fla. 2d DCA 2004), Moforis v. Moforis, 977 So.2d 786, 788 (Fla. 4th DCA 2008); *See also* Peters v. Peters, 479 So.2d 840, 841 (Fla. 1st DCA 1985) (holding that an increase in child support from \$550 to \$6,860 is “clearly a change in substance” which could not be corrected under 1.540(a)). Here, the court entered a Final Deficiency Judgment in the amount of \$216,485.73; then it entered the Amended Final Deficiency Judgment in the amount of \$529,630.64, almost 2.5 times as much. The difference between the judgments is substantial and does not qualify as a clerical error under the cases cited above. Accordingly, increasing the amount of a judgment is a substantive change in the judgment, which cannot be corrected by Rule 1.540(a).

Additionally, the Amended Judgment provides no indication that the trial court was attempting to change a clerical error, and the plain language of the amended judgment included the word “Amended” in its title (as opposed to “corrective” or some other word that would indicate the court was attempting to invoke Rule 1.540(a)). (R. 218-219) Accordingly, the lower court had no authority to enter the Amended Judgment under F.R.C.P. 1.540(a).

c. The lower court could not amend the Final Deficiency Judgment pursuant to Rule 1.540(b).

The lower court could not have utilized Rule 1.540(b) to amend the Final Deficiency Judgment. Rule 1.540(b) provides that “On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.” F.R.C.P. 1.540(b). In McCrea v. Deutsche National Trust Company, 993 So.2d 1057,1057 (Fla. 2d DCA 2008), the trial court vacated an order after engaging in ex parte communications with Deutsche National Trust Company. On appeal, Deutsche National alleged that the trial court had authority to vacate the order under Florida Rule of Civil Procedure 1.540(b). Id at 1058. The appealed order indicated that the earlier order ‘wrongfully stated that Deutsche Bank’s action was dismissed with prejudice.’ Id. The Court of Appeal held that “It may well be that the earlier order was the product of mistake, as opposed to judicial error, and was properly corrected by the trial court under rule 1.540(b). However, the McCreas were precluded from establishing the misapplication of rule 1.540(b) by the ex parte procedure that led to entry of the order. Id at 1058-1059. Accordingly, the Second District reversed the order. Id. Likewise, the record here does not

reflect any basis under which the court amended the Final Deficiency Judgment. Further, unlike the order in McCrea, the Amended Final Deficiency Judgment does not even provide language suggesting the grounds for the amended judgment. The Appellant here did not have the opportunity to question the propriety of the amendment, and the amended order here came after an ex parte communication between the Appellee and the court.

Moreover, the Second District Court of Appeal in Youth for Christ of Sarasota, Inc. v. Sarasota County, 765 So.2d 794, 795 (Fla. 2d DCA 2000), suggests that for the trial court to have jurisdiction to modify under Rule 1.540(b), the a party must have filed a motion to amend under that rule. The court in Youth for Christ states that the trial court was without jurisdiction to modify a final judgment where the Appellee failed to move for relief under Rule 1.540(b). Id at 795. Here, the Appellee failed to file a motion under Rule 1.540(b) and the Appellant had no opportunity to challenge the propriety of the Amended Judgment. Accordingly, both the McCrae and Youth for Christ cases direct that, in such circumstances, the Amended Final Deficiency Judgment was improper and must be reversed.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT WHERE IT MADE NO FINDING OF LIABILITY AGAINST THE APPELLANT.

The trial court erred in entering a personal judgment against the Appellant when the record lacks a finding of liability. “While ordinarily the granting of a deficiency judgment is within the sound discretion of the trial court, the record must disclose sufficient facts to justify the judgment.” Shaw v. Charter Bank, 576 So.2d 907, 908 (Fla. 1st DCA 1991). Here, the final judgment of foreclosure and the amended final judgments of foreclosure contain the following statement:

The Court does not determine at this time whether defendants are personally liable for damages under the note sued on, and therefore this judgment is without prejudice to defendants’ asserting any defenses to liability for damages on the note should plaintiff subsequently file a motion for deficiency judgment.

(R. 149, 157, 160)

The lower court made no subsequent findings of liability against the Appellant. Without such a finding it was error to enter a judgment against the Appellant.

The Appellee’s motion for a deficiency judgment in the lower court prayed for a judgment against the three individual defendants: Timothy Phillips, John B. Phillips, II and Lance E. Stehman. (R. 167-189) However, the Final Deficiency Judgment and Amended Final Deficiency Judgment

excluded John B. Phillips, II (“John Phillips”). (R.216-219) The lower court’s failure to state the basis for the disparate liabilities between John Phillips and the remaining defendants below impacts the rights of the Appellant. As an example, the exclusion of John Phillips potentially prevents the Appellant from seeking contribution or subrogation against John Phillips in the event the Appellee collects on the judgment from the Appellant. *See* Meckler v. Weiss, 80 So.2d 608 (Fla. 1955) (The general rule applicable to co-obligors that as between them, when one of them pays more than his proportionate share of the debt owed by both, the payer is entitled to contribution from the other; and where the entire obligation has been discharged the payor in addition to an action at law for restitution is entitled to be subrogated to the position of the creditor). By not placing on the record, or including in the judgment, any finding of liability (and a finding of non-liability for John Phillips), the trial court failed to meet its requirement to justify the deficiency judgment under Shaw. Accordingly, the Amended Final Deficiency Judgment was entered in error and must be reversed.

Conclusion

The trial court did not have authority to amend the Final Deficiency Judgment. The Appellee failed to file a timely motion to amend pursuant to

F.R.C.P. 1.530(g), and the change made to the Final Deficiency Judgment does not qualify as one that can be corrected as a clerical mistake under Rule 1.540(a). The lower court also could not amend the judgment under Rule 1.540(b). Further, the lower court failed to make any conclusions regarding the Appellant's personal liability in the Amended Final Judgment.

Accordingly, the trial court entered the Amended Final Deficiency Judgment in error and must be reversed.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was sent on this 7th day of March, 2011 via U.S. Mail to: Feldman, Koenig, Highsmith, and Van Loon, 3158 Northside Drive, Key West, Florida 33040.

Certificate of Compliance

I HEREBY CERTIFY that I have complied with the font requirements of Rule 9.210.

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