In the District Court of Appeal
Second District of Florida

CASE NO. 2D15-5429

(Circuit Court Case No. 2012 10096 CA 01)

JARRETT C. BUCKLEY,

Appellant,

v.

JP MORGAN CHASE BANK, N.A., et al.,

Appellees.

ON APPEAL FROM THE SIXTH JUDICIAL
CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

Table of Contents

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Rules

TABLE OF AUTHORITIES
(continued)

Statutes

STATEMENT OF THE CASE AND FACTS

I. Introduction

Jarrett C. Buckley ("the Homeowner") appeals the trial court's *sua sponte* non-final, appeal order vacating the final order of dismissal of the foreclosure lawsuit filed by JPMorgan Chase Bank, N.A. ("the Bank"). The Homeowner presents several issues for the Court's review:

- Whether the trial court violated the homeowner's due process rights by apparently holding an ex-parte hearing granting a continuance when no hearing was noticed and no attempt was made by the court or the party seeking the continuance to schedule a hearing on the continuance;
- Whether the court violated the homeowner's due process rights by making findings of fact unsupported by any hearing or evidence
- Whether the trial court had jurisdiction to enter the order vacating the final order of dismissal;
- Assuming that it did, whether the trial court violated the Homeowner's due process rights when it entered the order without notice and an opportunity to be heard.

II. Appellant's Statement of the Facts

The Bank initiated this action when it filed its one-count mortgage foreclosure complaint.[1] Before the Homeowner had even filed an answer, the trial

[1] Complaint, December 6, 2012 (App. 1-50).

court set the case for trial.[2] In response to this order, and a month before the trial was set to begin, the Homeowner served the Bank with a request for its trial exhibits and deposition dates for its trial witness.[3]

Rather than respond to the Homeowner's request, the Bank filed a motion to continue the trial six days before the trial was sent to commence alleging that it never received the trial order and only found out about the trial on the day it filed its motion.[4] The motion makes no mention of the Homeowner's trial discovery request, the motion is not verified, and is not signed by the client, in violation of Fla.R.Civ.Pro. 1.460 which provides that a motion for continuance, "shall be signed by the party requesting the continuance".

A. THE PLAINTIFF BANK OBTAINS EX-PARTE RELIEF WITH NO NOTICE OR OPPORTUNITY FOR THE HOMEOWNER TO BE HEARD

Most critically, **The Bank never filed a notice of hearing and there is absolutely no evidence or record of The Bank attempting to set this matter for hearing.** This fact is most important for this appellate court to consider because, as will be described in detail below, a hearing was apparently held, and relief was

[2] Order Schedule Trial, July 14, 2015 (App. 51-52).

[3] Notice of Request to Provide Trial Exhibits and Provide Trial Witness Exhibit Date, August 3, 2015 (App. 53-54).

[4] Plaintiff's Motion to Continue, September 2, 2015 (App. 55-60).

granted to The Bank, with absolutely no notice or opportunity to be heard on the part of the Homeowner.

As directed in the court's Order Setting Trial, The Homeowner appeared in court well in advance of the trial, which was to be heard before Senior Judge Karl Grube, formally checked in with court staff and advised that the Homeowner was prepared for trial. After waiting for several hours while the entire courtroom of approximately 20 contested cases was cleared (and after checking in several times to see if bank counsel had checked in), the court called the instant case for trial. As detailed in the transcript, your undersigned counsel alerted the court that Bank's continuance motion had been filed and then requested a dismissal since no one was there to argue it.[5] After the court staff confirmed that the Bank's lawyer had not checked in, the court granted the motion and involuntarily dismissed the case.[6] Entirely unknown to your undersigned counsel at that time, and **with no notice whatsoever to The Homeowner and with no attempt to schedule any hearing on the matter**, Judge Grube entered an order granting the Bank's motion to continue and rescheduling the trial.[7] The Docket reflects no record of the

[5] Transcript of Trial Before Judge Karl Grube, September 8, 2015 (App. 75; "T. ____") at 3.

[6] T. 3; Final Order of Dismissal, September 8, 2015 (App.61).

[7] Order Rescheduling Trial, September 8, 2015 (App. 62-63).

circumstances under which this Continuance was granted and there are no records or any evidence that provide the Homeowner with any record of how these ex parte proceedings were conducted. It should also be noted that after the Plaintiff apparently obtained this ex-parte relief, there is no evidence (and your undersigned can find no record) that the Plaintiff ever provided or served this Order on your undersigned counsel. The terribly frustrating thing about the ex-parte relief that was granted to the Plaintiff was that your undersigned had good grounds to argue against the continuance sought, the motion and asserted ground for continuance were not well taken and your undersigned was prepared to go to trial on that day. Even more frustrating, your undersigned had on numerous previous occasions on other foreclosure cases been pleading with the court and court staff to adopt formal process and procedure during which the court would hear such continuances, but these formal requests by your undersigned had been rejected. Accordingly and from direct experience where your undersigned knew that continuances would not be granted (especially when requested by a homeowner), your undersigned had no reason to expect any continuance would be heard, much less granted, prior to scheduled trial time. The critical issue for this court to consider is that your undersigned was denied entirely the right and opportunity to make these arguments

or any other, because proceedings were apparently held by this court without any notice or opportunity by your undersigned to be heard.

B. THE SUA SPONTE, EX-PARTE ORDER VACATING THE HOMEOWNER'S DISMISSSAL ORDER, VOID BECAUSE IT WAS NOT RENDERED BY THE JUDGE WHO ISSUED THE ORDER AGAINST WHICH IT WAS DIRECTED

Your undersigned left the court on September 8, 2015 with an Order of Dismissal, which was as reflected in the transcript, entered by the court with full disclosure of all facts. While not reflected in the record, your undersigned immediately that day, served this Order upon counsel for the Plaintiff. The Plaintiff did not respond to this Order, the Plaintiff did not file any motion objecting to this Order and no counsel or any party representing Plaintiff took any action whatsoever relating to this Order. Instead, days later your undersigned received a third Order, this Order signed by a different senior judge, Judge Marion Fleming, this order purporting to *sua sponte* vacate Judge Grube's dismissal order. Your undersigned asserts that this third Order was void because it was entered without notice or hearing, it was not prompted by any motion directed by either party and critically, Judge Fleming was a complete stranger to this case and the proceedings.[8] Your undersigned acknowledges that the court the inherent authority to enter sua sponte, ex parte orders, but that authority is limited and was

[8] Order Vacating Final Order of Dismissal, September 16, 2015 (App. 64-65).

exceeded with respect to this particular Order. What is most troubling about the circumstances surrounding the entry of this void Order signed by Judge Fleming purporting to vacate Judge Grube's Order is that the docket reflects no motion and no request at all on the part of the Plaintiff or any party to have such an Order considered, much less entered. And yet, with no formal or informal request by any party to consider the matters addressed in the Order, a judge who has no involvement in this case whatsoever, Judge Fleming, is somehow presented a prepared Order which she apparently signs. It bears repeating that your undersigned has no knowledge of how all of this transpired as there was no notice or opportunity to be heard afforded to your undersigned or this defendant homeowner. Upon receipt of this void Order, your undersigned timely and immediately moved to vacated the Order and cancel the "rescheduled" trial arguing, in part, that the trial court's prior orders were void.[9] At a hearing on this motion, the Homeowner argued before Judge Fleming that the Bank had apparently gotten a continuance the morning of the trial and had failed to alert him.[10] The Homeowner also argued that Judge Fleming was without jurisdiction to

[9] Defendant's Motion to Cancel Trial, October 26, 2015, ¶ 1 (App. 66-69).

[10] Transcript of Hearing Before Judge Marion Fleming, November 6, 2015 (App. 79; "T2. ___") at 5-6.

vacate Judge Grube's dismissal order and that a hearing before Judge Grube was appropriate.[11]

C. THE COURT FINDS, THERE HAS "ALREADY BEEN ENOUGH TIME WASTED ON THIS ISSUE" AND VACATES THE VOID ORDER

After taking the matter under advisement,[12] Judge Fleming found that while she had jurisdiction to correct an "administrative mistake," she nevertheless vacated her prior order because "there has already been enough time wasted on this issue."[13] And then, over two months after he first dismissed the case, Judge Grube entered an order vacating his dismissal order and ordering the trial to go forward on the "rescheduled" date[14] – again without notice or a hearing. At the rescheduled trial, the Homeowner once again argued (before yet another senior judge, yet another stranger to the prior proceedings) that he was not noticed for the initial hearing on the Bank's continuance motion, a fact particularly disturbing to him because his lawyer had been arguing for months that a formal procedure should have been put in place:[15]

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[11] T2. 7-8.

[12] T2. 8.

[13] Order Vacating September 16, 2015 Order, November 13, 2015 (App. 70-72).

[14] Order Vacating Dismissal, November 13, 2015 (App. 73-74).

[15] Transcript of Trial Before Judge Douglas Baird, November 17, 2015 (App. 92; "T3. ___") at 5-6.

> MR. WEIDNER: The one thing I want, Judge, is the Court, and, frankly, staff and Plaintiff's Counsel, to understand and acknowledge that when there was a continuance heard on September 8, 2015, I was neither noticed, nor was any attempt made to communicate with me.
>
> The reason why I'm bringing it to your attention, and the reason why I want staff to understand, and Plaintiff's Counsel, is I spent months arguing that if there are continuances going to be argued -- if they're going to be motioned, there should be a procedure to hear this.
>
> And I was rejected and have been for months now. And now I suffer the consequences of all this.
>
> Again, I want Counsel, because there's some confusion in the record as, perhaps, why they didn't fulfill his professional responsibilities. There is no evidence, and, in fact, it didn't occur, where Plaintiff attempted to coordinate a continuance the morning of trial. I just want to make sure that's clear.

Ultimately, the trial court continued the "rescheduled" trial[16] and the Homeowner timely appealed Judge Grube's order vacating the dismissal order.[17] With regard to the specific assertion found in Judge Fleming's Order that there had, "Already Been Enough Time Wasted On This Issue", your undersigned respectfully takes exception to that comment and would urge this court to take the time to carefully consider the very serious issues that are raised in this appeal. The lawyers and litigants that appear before our courts, whether the case be a multi-million dollar personal injury case or whether it be "merely" a foreclosure case,

[16] T3. 7.

[17] Notice of Appeal, December 8, 2015 (App. 102-103).

(that category of cases which have become disfavored by our courts generally) we are all entitled and should be afforded the same rights and respect. And while the record certainly reflects much effort and time spent on this case by the court and your undersigned counsel, the record is entirely devoid of evidence of any time or effort directed at this case by the Plaintiff...the party that is the ultimate beneficiary or all these taxpayer and judicial resources that are being directed at this case. Yes, the facts of this case demonstrate what has become an all too common phenomena in the context of foreclosure cases, namely the court directing more attention and resources at these cases than the party seeking the relief.

D. JUDGE GRUBE'S NOVEMBER 13, 2015 IS VOID FOR LACK OF JURISDICTION AND THE CASE SHOULD REMAIN DISMISSED

As will be more specifically articulated below, Judge Grube's November 13, 2015 Order is void for lack of jurisdiction and the case should remain dismissed pursuant to his Order that was entered at the only hearing that was properly noticed and during which both parties were provided both notice and an opportunity to be heard, the September 8, 2015 trial. If the Plaintiff sought any different outcome, it was incumbent upon the Plaintiff and not the court or court staff, to provide the motions, draft the Orders, schedule hearings and manage its own case to accomplish the ultimate

objectives that it seeks. Directing such an outcome is both equitably fair and procedurally correct. Given each of the different conflicting Orders that have been entered since that time, the total lack of action taken by the Plaintiff in this case since that Order and the failure of any evidence at all to support the improvidently Order of Continuance, respecting the Order of Dismissal is the only fair and equitable resolution of this case.

SUMMARY OF THE ARGUMENT

It is black letter law that the trial court lost jurisdiction over the case once it entered the dismissal order except to the extent provided for in Rules 1.530 and 1.540, Florida Rules of Civil Procedure. But since more than 15 days had passed between entry of the dismissal order and Judge Grube's order vacating the dismissal, Judge Grube was without jurisdiction to grant rehearing or a new trial.

But even if Judge Grube had jurisdiction to enter the order under review, the order must still be reversed because it was entered without notice and an opportunity to be heard in violation of the Homeowner's procedural due process rights. And this holds true whether the Court decides that Judge Grube's order was permissible under Rule 1.530 or under Rule 1.540.

Therefore the order should be reversed with instructions that on remand the trial court either reinstate the dismissal or hold an evidentiary hearing on its *sua sponte* decision to vacate the dismissal.

STANDARD OF REVIEW

While orders from relief from judgment are normally reviewed under the abuse of discretion standard, whether a lower court has "[w]hether a lower tribunal had subject matter jurisdiction is a question of law which [appellate courts] review *de novo*." *Department of Revenue v. Selles*, 47 So. 3d 916, 918 (Fla. 1st DCA 2010). *See also Metro-Dade Invs., Co. v. Granada Lakes Villas Condo., Inc.*, 74 So.3d 593, 594 (Fla. 2d DCA 2011); *Sanchez v. Fernandez*, 915 So. 2d 192, 192 (Fla. 4th DCA 2005); *Jacobsen v. Ross Stores*, 882 So. 2d 431, 432 (Fla. 1st DCA 2004); *Seven Hills, Inc. v. Bentley*, 848 So.2d 345 (Fla. 1st DCA 2003).

In any event, a trial court abuses its discretion when it denies a party a hearing to which he is entitled. *Avi-Isaac v. Wells Fargo Bank, N.A.*, 59 So. 3d 174, 177 (Fla. 2d DCA 2011).

ARGUMENT

I. The trial court erred in vacating the dismissal order.

After entry of the final order of dismissal, the trial court lacked jurisdiction to alter, vacate, or modify it except as provided for in Fla. R. Civ. P. 1.530 and 1.540. *Shelby Mutual Ins. Co. of Shelby, Ohio v. Pearson*, 236 So. 2d 1, 3-4 (Fla. 1970). Because the time for rehearing had long since ran when Judge Grube entered his order vacating the dismissal, and since due process required a hearing before the dismissal could be vacated anyway, the order under review must be reversed.

A. The court lacked jurisdiction to vacate the dismissal order under Rule 1.530 because more than 15 days had passed since entry of the order.

While a trial court has inherent authority to order a rehearing or a new trial for any reason that it might have granted a rehearing or new trial on a party's motion, this order must be made within 15 days after entry of a final judgment or dismissal. Fla. R. Civ. P. 1.530(d); *Helmich v. Wells Fargo Bank, N.A.*, 136 So. 3d 763, 764-765 (Fla. 1st DCA 2014). Thus, a trial court lacks jurisdiction to *sua sponte* order rehearing or a new trial if more than 15 days have passed since entry of the judgment. *See Jankowski v. Dey*, 64 So. 3d 183, 189 (Fla. 2d DCA 2011) ("In addition, the circuit court erred in entering what amounted to an order

amending the Former Wife's final judgment for attorney's fees several months after the judgment became final by redirecting payment of the award—in part—to DeCort and Stahl.").

Here, Judge Grube entered the final order of dismissal on September 8, 2015[18] and did not vacate it until November 13, 2015[19] — over two months after entry of the order and well after the rehearing time had run. The trial court was therefore without jurisdiction to enter a new trial under Rule 1.530.

The Bank may argue that Judge Fleming's order vacating the dismissal,[20] concededly entered during the time period for rehearing, somehow tolled the time for Judge Grube to enter his order. However, since Judge Fleming ultimately vacated her order,[21] Judge Fleming's first order was void. *Department of Revenue v. Marchines*, 974 So. 2d 1085, 1090 (Fla. 2d DCA 2007) ("Vacate means to render inoperative; deprive of validity; void; annul.") (citations omitted). And a void order has no force or effect. *Goolsby v. State*, 914 So. 2d 494, 496-497 (Fla. 5th DCA 2005) ("A void order has no force or effect and is a nullity.").

[18] Final Order of Dismissal, September 8, 2015 (App. 61).

[19] Order Vacating Dismissal, November 13, 2015 (App. 73-74).

[20] Order Vacating Final Order of Dismissal, September 16, 2015 (App. 64-65).

[21] Order Vacating September 16, 2015 Order, November 13, 2015 (App. 70-72).

Thus, Judge Grube needed to have entered his order by September 23, 2015. And since this did not happen, Judge Grube lacked jurisdiction to enter his November 13th order and it must be reversed. *Apthorp v. Detzner*, 162 So. 3d 236 (Fla. 1st DCA 2015) (acknowledging the appellate court's duty to correct a lower court's unlawful exercise of jurisdiction by vacating or quashing an order entered without jurisdiction.).

B. Due process required a hearing before the trial court could vacate the dismissal order.

But even if Judge Grube somehow had jurisdiction to enter his November 18th order, it still must be reversed because it was entered without a hearing — which clearly violated the Homeowner's procedural due process rights.

The trial court was required to hold a hearing before it could "grant" a new trial under Rule 1.530.

The basic due process guarantee of the Florida Constitution provides that neither life nor liberty nor property will be deprived without due process of the law. Art. I, § 9, Fla. Const. Procedural due process acts as a medium that ensures fair treatment to all litigants through the proper administration of justice where substantive rights are at issue. *Department of Law Enf. v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991).

There is no bright-line rule that courts follow in determining whether the requirements of due process have been met in a particular case. *Hadley v. Department of Admin.*, 411 So. 2d 184, 187 (Fla. 1982). However, at a minimum, procedural due process under the Florida Constitution contemplates that a litigant will be given notice and a real opportunity to be heard before the litigant's substantive rights are decided by the court. *General Elec. Capital Corp. v. Shattuck*, 132 So. 3d 908, 911 (Fla. 2d DCA 2014). *See also State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (1936). As such, this Court has been clear that due process requires a live hearing before the trial court can grant a motion for rehearing. *J.R. Fenton, Inc. v. Gallery 600, Inc.*, 488 So. 2d 587, 588 (Fla. 2d DCA 1986).

Here, there can be no dispute that the trial court violated the Homeowner's due process rights since Judge Grube's order was entered without a hearing. To make matters worse, the Homeowner actually argued that a hearing was necessary.[22]

Had the trial court not trampled all over the Homeowner's due process rights, he would have initially argued that the order continuing the trial[23] was void

[22] T2. 7-8.

[23] Order Rescheduling Trial, September 8, 2015 (App. 62-63).

because (like Judge Fleming's order vacating the dismissal order and Judge Grube's subsequent order vacating the dismissal order), it was entered without notice and an opportunity to be heard. *Metropolitan Dade County v. Curry*, 632 So. 2d 667, 668 (Fla. 3d DCA 1994) ("An order entered without notice or opportunity to be heard is a void order.").

And had he been given an opportunity to argue the motion to continue, the Homeowner would have argued that it should first be denied on procedural grounds because it was not signed by the Bank and to the extent its vague allegations meant to allege it could not procure a trial witness, the motion did not show when the Bank believed its witness would be available. Fla. R. Civ. P. 1.460 (continuance motions must be signed by party requesting continuance and, to the extent continuance is based on witness unavailability, must show when it is believed the witness will be available). Next, the Homeowner would have argued that an evidentiary hearing was required to rebut the presumption that the Bank had received the trial order. *See Richardson v. Chase Manhattan Bank*, 941 So. 2d 435 (Fla. 3d DCA 2006); *Scott v. Johnson*, 386 So. 2d 67 (Fla. 3d DCA 1980) (holding that denial of receipt of notice of trial did not rebut presumption of trial court's certificate of mailing of notice requiring an evidentiary hearing).

But the trial court did none of these things. In fact, the Bank never even asked the trial court to vacate the dismissal order — indeed, it appeared befuddled by the entire episode at the subsequent hearings. As such, the trial court gave the impermissible appearance of acting as the Bank's advocate after dismissing its case. *Nationstar Mortg., LLC v. Marquez*, __ So. 3d __, 2015 WL 8932416, at *2 (Fla. 3d DCA December 16, 2015) ("A trial judge should rule on objections and motions made by counsel and never suggest or advise counsel how to try his or her case.").

What is all the more maddening is that the Homeowner's lawyer had for months suggested a procedural mechanism through which continuance motions should be heard only to be shut down repeatedly by the trial court.[24] Trial courts of this State are not permitted to operate in Kafkaesque Star Chambers rendering decisions without notice and an opportunity to be heard — and it does not make one bit of difference that this is a foreclosure case.

The trial court was also required to hold an evidentiary hearing before grant relief under Rule 1.540.

Finally, the Homeowner was also entitled to an evidentiary hearing even if the Court considers Judge Grube's order permissible under Fla. R. Civ. P.

[24] T3. 7.

1.540(b). *Arcila v. BAC Home Loans Servicing, LP*, 145 So. 3d 897, 898 (Fla. 2d DCA 2014) ("A trial court errs in granting a motion for relief from judgment without affording the opposing party an opportunity to be heard at an evidentiary hearing.").[25]

[25] Nor can Judge Grube's order be considered an order under Rule 1.540(a) since the order corrected a perceived error or mistake in the substance of what was decided and therefore could only be corrected pursuant to Rule 1.540(b). *Town of Hialeah Gardens v. Hendry*, 376 So. 2d 1162, 1164 (Fla. 1979).

CONCLUSION

The Court should reverse the order under review with instructions that on remand, the trial court either reinstate the dismissal order or hold an evidentiary hearing on its *sua sponte* decision to vacate the dismissal

Dated: May 18, 2016

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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CERTIFICATE OF SERVICE AND FILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this May 18, 2016 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this May 18, 2016.

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