

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D23-2304

MANUEL BLANCO, ROSA TIJERINO BLANCO, et al.,

Appellants,

vs.

SOUTH WINDS CONDOMINIUM ASSOCIATION, INC.,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS¹

This appeal arises from summary judgment of foreclosure in favor of Plaintiff South Winds Condominium Association, Inc. (“Association”) against Defendants Blanco (“Owners”) where there was no notice of the special assessment and payments for the monthly fees were tendered, but not credited.

FACTS:

On February 28, 2019, the Association sent a letter to Owners listing delinquent monthly assessments for October 2018 through March 2019 of \$739.44 plus April 2019 of \$123.24, as well as a special assessment of \$273.84. R. 112. On April 8, 2019, Association filed a claim of lien as to those amounts. R. 114, 115. An Affidavit of Indebtedness lists delinquent monthly assessments for October 2018 through February 2020 of \$2,095.08 and interest of \$157.13. R. 146. The special assessment of \$273.84 had accrued \$36.51 in interest. R. 147.

The Association filed its Complaint of Foreclosure to foreclose on liens for assessments. R. 20-21. The Association claimed the Owners were

¹ All citations are to the Record (“R”) followed by the page number.

delinquent in paying their share of regular common expenses (“monthly maintenance fees”) and a special assessment of \$273.84. R.22, R. 225.

The Owners stated affirmative defenses of failure to comply with conditions precedent, that they had tendered all regular assessments, including the seven months claimed in Claim of Lien. R.97. The Association also failed to send notice of the special assessment as required by Fla. Stat. §718.116. R.97.

The Association moved for summary judgment on February 14, 2020 asserting it had complied with all notice requirements. R. 109. The trial court heard arguments on March 23, 2021 and granted the Motion, holding that the written demands with regards to the assessments in arrears complied with §718. 116. R. 224. The Association was granted summary judgment of foreclosure for all regular assessments, the special assessment, and attorneys’ fees and costs. R. 225. The Order Granting Final Judgment of Foreclosure was entered on October 23, 2022. R. 223.

The Order Granting Final Summary Judgment retained jurisdiction to issue “a Final Judgment of Foreclosure establishing all amounts due and owing and scheduling a date for the judicial sale of the unit, and any further orders in connection to any post-judgment proceedings.” R. 226.

Proceedings Below:

The Owners filed an Emergency Verified Motion to Vacate Final Summary Judgment and Stay Execution of Same on December 2, 2022. R. 248. The Motion challenged the Association's underlying statutory compliance with Section 718. R. 249. Specifically, that the Final Judgment was secured from a Claim of Lien that did not comply with the statute. R. 249. Violations of §718.116(10), Fla. Stat. §718.121(14) and §718.116 (6)(b)b are incurable as conditions precedent; strict compliance is required. R. 252-253.

Attached to the Motion were Proof of Mailing and USPS Tracking Information for all payments made from October 2018 through October 2022. R. 281-330. On May 15, 2019, the Association rejected the May 2019 monthly assessment, demanding payment in full. R. 402. That letter was not received. R. 405.

In support of its contention that sufficient notice was provided, the Association offered notice of a special meeting to consider the special assessment. R. 365. The minutes from that meeting do not show that any decision as to a special assessment was voted on. R. 367. The Association then sent a letter to the Owners as to a special assessment to replace funds borrowed from the reserve account. R. 368. The letter states that payment

in full must be received by December 15, 2018 or a Claim of Lien will be filed without further notice. R. 368. These special assessment amounts are not the same as the \$273.84 claimed as the Delinquent Special Assessment.

Notice of the Claim of Lien was provided after the fact by letter dated April 16, 2019 from the Association attorney. R. 392. The certified letter was returned. R. 394. A copy of the recorded lien was sent on June 4, 2019, but returned. R. 397, 399.

The Emergency Motion was heard on November 21, 2023. R. 446. In dispute was whether payment was made. R. 457. Also disputed was whether Owners received written notice pursuant to §718.116(10) of the special assessment. R. 458. The Association's Motion for Final Judgment and Incorporated Motion for Reasonable Attorney's Fees and Costs (Amount) was also heard. R. 473. Arguments presented and rebutted by the parties centered on the merits of the summary judgment.

The Association acknowledged receiving the checks, but none were for the special assessment. R. 463. The checks were sent to the property management company instead of the attorney's office. R. 464. The Association objected to the language written on the checks so did not cash them. The checks contained the following language: "This check is void after [the end of the month]. Gold Property Management and Associates, Inc.,

received this check by certified mail and its payment constitutes its acknowledgment that unit 210 in Building 9300 is not delinquent in the payment of any monthly obligation due to the association.” R. 404. The checks were paid to the order of South Winds Condominium Association, Inc. R. 404.

The Court held that there was not enough to vacate the judgment. [under Rule 1.540(b)]. R. 473. The Emergency Motion was denied. R. 514. Final Judgment of Foreclosure was rendered on December 1, 2023. R. 514. This appeal timely followed on December 28, 2023. R. 432.

STANDARD OF REVIEW

In a foreclosure proceeding, where the trial court’s findings are based on facts, the standard of review is abuse of discretion while any legal conclusions are subject to de novo review. *Gonzalez v. Fannie Mae*, 276 So. 3d 332, 335 (Fla. 3d DCA 2018). The denial of a motion for relief from final judgment under Florida Rule of Civil Procedure 1.540(b) is reviewed for an abuse of discretion. *Mesa v. Miami-Dade Cty.*, 278 So. 3d 818, 820 (Fla. 3d DCA 2019).

SUMMARY OF THE ARGUMENT

The Association's misconduct in failing to give notice of the special assessment or of the claim of lien mandates that the foreclosure judgment be vacated; Letters after the fact do not comport with statutory requirements.

The Association's misconduct of failing to apply Owners' payments also requires that the judgment be vacated. Had the payments been credited, the only amounts owing would have been \$273.84 plus interest for the special assessment and would not have accrued the added interest, late fees or attorneys' fees.

ARGUMENT

Florida Rule of Civil Procedure 1.540(b) allows a court to relieve a party from final judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) that the judgment, decree, or order is void; or

(5) that the judgment, decree, or order has been satisfied, released, or discharged, or a prior judgment, decree, or order upon which it is based has been reversed

or otherwise vacated, or it is no longer equitable that the judgment, decree, or order should have prospective application.

The reasons present in this case are misconduct of an adverse party, which caused the invalidity of the Claim of Lien upon which the foreclosure was based, and that the assessments were paid before the liens and foreclosure were filed.

I.

DENIAL OF THE MOTION TO VACATE THE FINAL JUDGMENT SHOULD BE REVERSED BECAUSE THE FAILURE TO PROVIDE STATUTORY NOTICE WAS MISCONDUCT

The Emergency Motion was brought pursuant to Fla. R. Civ. P. 1.540(b). R. 249. Specifically, that misconduct of an adverse party in securing a Claim of Lien premised on special assessments that “ran afoul” of Fla. Stat. §718.115(10) in that written notice of the special assessment was never sent or delivered to each unit owner. R. 250. Additionally, it was misconduct to fail to send notices of intent to file a lien and intent to foreclose pursuant to §§718.121(4) and 718.116(6)(b).

In its Response, the Association only addressed excusable neglect. R. 360. The Trial Court was not specific as to why it denied the motion, did not rule as to misconduct.

Rule 1.540(b)(3) addresses misconduct of an adverse party and provides relief from final judgment. *Voce v. Wachovia Mtg., FSB*, 174 So. 3d 545, 547 (Fla. 4th DCA 2015). The court may relieve a party from a final judgment if it determines that the final judgment was procured by misconduct. *Bryers v. Callahan*, 848 So. 2d 1180, 1184 (Fla. 2d DCA 2003). The misconduct must affect the final judgment. *See, e.g., Coleman Holdings, Inc., v. Morgan Stanley & Co., Inc.*, 20 So. 3d 952, 956 (Fla. 4th DCA 2009). “The matter must affect the outcome of the case and not merely be ‘de minimis,’” *Azram Miami 2 LLC v. US Bank and Trust, N.A.*, 343 So. 3d 605 (Fla. 3d DCA 2021).

Black’s Law Dictionary defines misconduct as a transgression of some established and definite rule of action. Black’s Law Dictionary 1150 (Rev. 4th edition 1968).

Fla. Stat. §718.116(10) requires that the specific purpose of any special assessment, approved in accordance with the condominium documents “shall be set forth in a written notice of such assessment sent or delivered to each unit owner.” Discussion of an assessment at a board meeting and a letter sent demanding payments be made do not satisfy this requirement. Similarly, §718.116(6)(b) requires written notice of intention to

foreclose a lien to collect unpaid assessments and must be in substantially the following form:

Delinquent assessment

This letter is to inform you a Claim of Lien has been filed against your property because you have not paid the (type of assessment) assessment to (name of association). The association intends to foreclose the lien and collect the unpaid amount within 30 days of this letter being provided to you.

You owe the interest accruing from (month/year) to the present. As of the date of this letter, the total amount due with interest is \$. All costs of any action and interest from this day forward will also be charged to your account.

Any questions concerning this matter should be directed to (insert name, addresses, and telephone numbers of association representative).

The letter sent on April 16, 2019, does not in any way conform to the necessary statutory requirements. See Letter from Association attorney at R. 392.

In this case, failure to provide proper notice of the special assessment affects the validity of the Claim of Lien. The requirement that an association give notice before attaching a lien to property “is no mere technicality.” *Rajabi v. Villas at Lakeside Condo. Ass’n.*, 306 So. 3d 400, 402 (Fla. 5th DCA 2020), citing *Dwork v. Exec. Estes. Of Boynton Beach Homeowner’s Ass’n.*, 219 So. 3d 858, 860 (Fla. 4th DCA 2017). Failure to provide proper notice as to intent

to foreclose affects the entire judgment. Therefore, it was an abuse of discretion to deny the motion to vacate the judgment.

II.

DENIAL OF THE MOTION TO VACATE FINAL JUDGMENT SHOULD BE REVERSED BECAUSE THE FAILURE TO APPLY THE TENDERED PAYMENTS WAS MISCONDUCT

On October 3, 2018, Owners paid the monthly assessments in person to the management company. R. 282. Thereafter, monthly maintenance was sent certified mail to Alexis Acosta at the management company for November 2019 through December 2022. R. 283-330.

In early 2019, the Association's attorney sent delinquency letters as to assessments, late fees, interest, attorneys' fees and costs. R. 387-403. The May 2019 letter attempted to return the May 2019 check for payment. R. 404. Owners never received the correspondence so were not informed that payments should be sent to the attorney, not the management company.

The Association's reasons for rejecting payment was that accepting the checks might be construed as a waiver of its claims. R. 463-464. That view is contrary to *Ocean Two Condo. Ass'n. v. Kliger*, 983 So. 2d 739 (Fla. 3d DCA 2008).

In *Kliger*, this Court held that §718.116(3)² specifically provides that payments will be applied on account, without prejudice to the association's and unit owner's respective positions, ***even if the unit owners place a restrictive endorsement, designation, or instruction on the payment.*** *Id.* at 741. Thus, the failure to credit the payments resulted in the foreclosure suit being premature. Further improper rejection of the payments by the attorney called into question the right to attorneys' fees. *Id.* at 742.

In *Saar v. Wellesley at Lake Clark Shores Homeowners Ass'n.*, 68 So. 3d 417 (Fla. 4th DCA 2011), a final judgment foreclosing a claim of lien for unpaid condominium assessments was reversed.

Saar was required to make quarterly and monthly assessments, which she frequently paid late. Saar missed the October 2005 quarterly assessment of \$755 because her check was never received. Six months later, the managing agent sent a letter stating she owed \$1,131 without identifying the October payment. Saar responded that she had cancelled checks for all payments for which delinquency was claimed. The attorneys for the association then began a series of demand letters, each adding

² The current version of the statute states that payments received by an association must be applied notwithstanding any purported accord and satisfaction, or any restrictive endorsement, designation or instruction placed on or accompanying payment. §718.116(b)(3)

additional amounts due—including for payments Saar had proved she made. *Id.* at 417. Despite acknowledgement that Saar had made partial payment, a claim of lien was filed on June 2006 for \$1,076.49 and foreclosure filed in October 2007. *Id.* Although Saar had paid all the specific assessments and late fees and the October 2005 assessment, the association still claimed interest, late fees, and attorneys' fees. Several of Saar's payments had not been promptly deposited by the law firm, thus causing additional late charges and interest. *Id.* at 418.

The testimony at trial showed that the assessments stated in the claim of lien and in the demand letters had been paid and the claim of lien was incorrect. The Fourth District held that the claim of lien was improper and final judgment of foreclosure was reversed.

As did Saar, the Owners showed that they consistently made payments and had detailed records in support, none of which were credited. The Claim of Lien states that \$2,552.10 was owed, but had payments been credited, only \$273.84 plus \$11.41 interest was due, aside from attorneys' fees and costs of \$1,142.60. R. 393.

As in *Rajabi*, "reversal of the final judgment of foreclosure is mandated by the existence of two errors—the Association's erroneous handling of [Owners'] payments in breach of the Declaration and corresponding statute,

and the Association's failure to give [Owners] the required notice of intent to record the . . . claim of lien." *Rajabi*, 306 So. 3d at 402.

So, too, in this case, the failure to credit payments requires reversal of the foreclosure so that the judgment should be vacated.

CONCLUSION

Pursuant to Rule 1.540(b)(3), summary judgment of foreclosure should be vacated because the basis for the Claims of Lien resulted from misconduct and failure to credit payments made.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing were served by email upon Andrew Kawel, Counsel for Appellee, Kawel PLLC, 2 S. Biscayne Blvd, Suite 2000, Miami, FL 33131, apkawel@kawelaw.com; on April 5, 2024.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been computer generated in 14-point Arial, contains 2,464 words, and otherwise complies with the requirements of Rule 9.210.

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