

**IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA**

UNIVERSAL PROPERTY & CASUALTY
INSURANCE COMPANY
a/s/o LISA SHECTMAN,

Appellant,

CASE NO. - 4D2024-0010

L.T. No. - CACE17-018014

V

MELISSA A. WILLIAMS; RANDY M.
WILLIAMS; ALL AMERICAN BUILDERS
& DEBRIS REMOVAL,
INC.; and ALADDIN PLUMBING
& CONSTRUCTION CORP.,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT OF FLORIDA

**APPELLANT UNIVERSAL PROPERTY & CASUALTY INSURANCE
COMPANY'S REPLY BRIEF**

/ Carlos Cruanes _____

CARLOS CRUANES, ESQ.

Andreu, Palma, Lavin & Solis, PLLC

815 N.W. 57th Avenue, Suite 401

Miami, FL 33126

(305) 631-0175

ccruanes@cruaneslaw.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS/AUTHORITIES.....iii

CASELAW.....iii

OTHER AUTHORITY.....iv

I. THE STANDARD OF REVIEW.....1

II. REBUTTAL ARGUMENTS

 A. THE TRIAL COURT ERRED AS A MATTER OF LAW IN
 VACATING THE JUDGMENT AS IT WAS NOT VOID.....3

 1. Appellant did submit a transcript of the evidentiary
 hearing and has properly briefed the Court on
 appeal;.....8

 2. The trial court erred in setting aside the default and
 vacating the default judgment against the Williamses as they
 were properly served and aware of the lawsuit in compliance
 with their due process
 rights;.....9

 3. The trial court was in error in setting aside the
 default and vacating the default judgment because the Williamses
 did not meet the three-prong test for setting aside a
 default;.....15

CONCLUSION.....18

CERTIFICATE OF

SERVICE.....19

APPELLANT’S RULE 9.210 CERTIFICATE.....20

TABLE OF CITATIONS/AUTHORITIES

CASE LAW

Decker v. Kaplus, 763 So.2d 1229 (Fla. 5th DCA 2000)..... 11

Deutsche Bank Nat'l Tr. Co. v. Garcia del Busto, 254 So. 3d 1050,
(Fla. 3d DCA 2018).....6

Elliott v. Aurora Loan Servs. LLC, 31 So.3d 304
(Fla. App. 2010)..... 18

Estrada v. Estrada, 274 So.3d 426 (Fla. 3d DCA 2019)..... 14, 15

Foche Mortgage, LLC v. CitiMortgage Inc., 163 So. 3d 525 (Fla. 3d
DCA 2015)..... 1

Fortune Ins. Co. v. Sanchez, 490 So.2d 249 (Fla. 3d DCA 1986).... 18

Kalb v. The Sail Condominium Association, Inc.,
112 S0.3d 674 (Fla 3rd DCA 2013)..... 17

Kozinski v. Phillips, 126 So.3d 1264 (Fla. 4th DCA 2013)..... 11

Mathews Corp., v. Green Pool Services 584 So. 2d 1006
(Fla.3d DCA 1990)..... 18

Nationstar Mortgage, LLC v. Diaz, 227 So. 3d 726
(Fla. 3d DCA 2017).....1

Richard v. Bank of America, N.A., 258 So.3d 485
(Fla. 4th DCA 2018).....13, 14

Rodriguez–Faro v. M. Escarda Contractor, Inc., 69 So.3d 1097, 1098
(Fla. 3d DCA 2011).....13

Van Tran, v. Deutsche Bank Nat’l Trust Co., 302 So.3d 990 (Fla. 3d
DCA 2020).....6

Vercosa v. Fields, 174 So.3d 550 (Fla. 4th DCA 2015).....12

OTHER AUTHORITY

Fla. R. Civ. P. 1.540(b).....1, 4, 5, 14, 15

Fla. R. Gen.Prac. & Jud.Admin. 2.516.....8

THE STANDARD OF REVIEW

The applicable standard of review on a trial court’s ruling on a motion for relief from judgment filed under Florida Rule of Civil Procedure 1.540(b) is whether there has been an abuse of the trial court’s discretion.” *Foche Mortgage, LLC v. CitiMortgage Inc.*, 163 So. 3d 525 (Fla. 3d DCA 2015). However, where a motion to ***vacate*** depends upon whether the underlying order is void, the determination is a legal question that is reviewed ***de novo***. See *Nationstar Mortgage, LLC v. Diaz*, 227 So. 3d 726, 729 (Fla. 3d DCA 2017).

Thus, on the main issue cited herein, this Court’s standard of review is *de novo*.

REBUTTAL ARGUMENTS

I. Appellee’s Statement of Facts

Appellee contends that there were issues with Appellants’ statements of fact. Each shall be addressed briefly. First, Appellee’s contend that:

“the insurance company filed a notice of filing of email communications. (A. 137-145.) The insurance company did not append any argument to the notice of filing or state for

what it would be used. (See A. 137-145.)”¹ The referenced email communications were filed and listed in the record as App. 137-145, and were discussed to the trial court during the evidentiary hearing.²

Contrary to Appellee’s assertion that they served no purpose, they were used to demonstrate Mr. Cuenant’s inaccurate statements that he only had one email address in use during the relevant time period. The filings clearly demonstrate that he was in fact communicating with Appellant’s attorney at least as late as November 2017, using both the email address that he acknowledged using; winston@cuenantlaw.com; but also the winston@cmclegal.net that he claimed he had not used. This was the same email address that was on the certificate of service on the documents that Mr. Cuenant claims he never received.³ He claimed that he had not used this email address for at least ten years prior to the evidentiary hearing which took place in 2023.⁴ Clearly this was not accurate.

Appellees also stated that Appellant made several references in its Amended Initial Brief which were not supported by the record.

¹ Appellee’s Amended Answer Brief pg. 5.

² Supp. ROA, page 19.

³ Supp. ROA, pages. 9-10.

⁴ Supp. ROA. 10-11.

Namely, Appellants assertions that Cuenant and Universal's attorney emailed various times regarding Cuenant's requested extension of time in which to respond to the complaint, and that he used both the email addresses of winston@cuenantlaw.com, and winston@cmclegal.net. As just discussed supra, the fact that Cuenant used both of these email addresses is clearly supported in the record.

Appellees also take issue with Appellant's statement in the brief that "over 47 docket entries were submitted via the E-Filing system by the multiple parties, which would have served all of the listed attorneys, including Cuenant."⁵ This is also clearly supported within the record. The docket contains approximately 97 entries of documents filed in this matter after the agreed order on Cuenant's motion for extension and prior to the appeal, during which Cuenant was a listed E-Service recipient.⁶

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN VACATING THE JUDGMENT AS IT WAS NOT VOID

⁵ Appellee's Amended Answer Brief pg. 8.

⁶ ROA. Also, see Amended Initial Brief, pages 14-16 with applicable footnote references to the Appendix. As well as the docket which shows well over 47 docket entries.

The Williamses raise three points in their Answer Brief; that (1) Appellant, by not submitting a transcript of the evidentiary hearing has waived its arguments on appeal; (2) The trial court did not err in setting aside the default and vacating the default judgment because the Williamses were denied their due process rights; (3) The trial court did not err in setting aside the default and vacating the default judgment because the Williamses met the three-prong test for setting aside a default. Each shall be addressed in turn.

However, first it is most telling to point out what they did not address in their Answer Brief. They did not address the main issue in the appeal, that they did nothing for five years after acknowledging service of process of the lawsuit, and their attorney being properly served through the E-Filing Portal.

None of the arguments of a transcript or of meeting Rule 1.540(b)(1)(2)(3) requirements for setting aside a default, or due diligence, or meritorious defenses, are germane to the issues in the case at bar when the judgment was not void and the one year timeline pursuant to 1.540(b)(1)(2)(3) had run. The reality remains

that in order to prevail in setting aside a default judgment pursuant to that rule, the motion must be brought within one year of the date of the entry of the default judgment.

Rule 1.540(b) specifically provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. 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; (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 or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. **The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken.**⁷ A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

It is undisputed in the record that the Default Final Judgment was entered on June 19, 2018, and Defendants' Emergency Motion to Vacate Default was not filed until August 17, 2023, a

⁷ Emphasis added.

full 5 years later. Thus, as a matter of law, the motion was untimely under the rule and this Court must reverse the trial court's orders, unless the Williamses can clearly demonstrate that the trial court's order granting the default was a void order. And this Court must then review the issue de novo. (See, *Van Tran, v. Deutsche Bank Nat'l Trust Co.*, 302 So.3d 990 at 993 (Fla. 3d DCA 2020):

"This Court generally reviews a trial court's ruling on a rule 1.540(b) motion for relief from judgment for abuse of discretion." *Deutsche Bank Nat'l Tr. Co. v. Garcia del Busto*, 254 So. 3d 1050, 1052 (Fla. 3d DCA 2018)... **"As a trial court's ruling on whether a judgment is void presents a question of law, an appellate court reviews the trial court's ruling de novo."**⁸ *Nationstar Mortg., LLC v. Diaz*, 227 So. 3d 726, 729 (Fla. 3d DCA 2017) (citation omitted)).

The Williamses cannot show that the Default Final Judgment was void. Their arguments of failure of proper notice fail in the face of the clear record in the case at bar. First, it is undisputed by the parties that the Williamses' were properly served with the complaint.⁹ That their attorney, Winston Cuenant (Cuenant) E-filed his Notice of Appearance and a Motion for Extension of Time to File Answer or Responsive Pleading.¹⁰ That Mr. Cuenant had his correct

⁸ Emphasis added.

⁹ App #4 and 5.

¹⁰ App #6 and 7.

email address on the e-filing portal.¹¹ That Mr. Cuenant received the order granting the extension of time to file an answer or responsive pleading that he had filed, at his listed service email address winston@cuenantlaw.com.¹² Mr. Cuenant did not file any document in response to that order. And from that moment forward, numerous other docket entries were submitted via the E-Filing system by the multiple parties, which would have served all of the listed attorneys, including Cuenant.¹³ Mr. Cuenant took no further action in this matter.

As stated in the Initial Brief, the reality is that service of these documents were all properly effectuated once they were filed via the E-Filing portal. Mr. Cuenant's email address was correct in the E-Filing portal, thus the presumption is that he received all of these documents and failed to act. In addition to being a registered filer on E-File for this matter, Mr. Cuentant and the Williamses were mailed numerous documents to his office and their residence. They do not explain why they did not receive those

¹¹ Affidavit of Winston Cuenant, paragraph 6, attached as Ex A to App. #36.

¹² Affidavit of Winston Cuenant, paragraph 6, attached as Ex A to App. #36.

¹³ See Initial Brief, pages 14-16 with applicable footnote references to the Appendix. As well as the docket which shows well over 47 docket entries.

documents either.

Regardless, as stated at length in the Amended Initial Brief, UNIVERSAL fully complied with its responsibilities as to service of documents to the Defendants, pursuant to Fla.R.Gen.Prac. & Jud.Admin. Rule 2.516.

And, once again, it was always Cuenant's responsibility to ensure that the email address that he was using was the correct one, pursuant to Rule 2.516 (b)(1)(A).

Thus, as discussed at length in the Initial Brief, the Defendants' Motion to Vacate Default and default final judgment should not have been granted, as the Judgment entered against the Williamses was not void, and the Motion to Vacate was over five years too late.

A. Appellant did submit a transcript of the evidentiary hearing and has properly briefed the Court on appeal;

Appellee now contends in its Amended Answer Brief that there were apparently other hearings held on the Motion to Vacate. Appellee does not identify when these hearings allegedly took place, nor does it identify the docket entry as to when these hearings

supposedly took place. Appellee did not raise these other hearings in its initial Answer Brief, only that Appellant had failed to provide a transcript for the evidentiary hearing on December 6, 2023. In an effort to resolve this issue, Appellant successfully moved this Court for leave to supplement the record with the transcripts of the evidentiary hearing on December 6th, and also included a transcript for a previous hearing which took place on November 29th.

Appellant obtained these transcripts from the court reporter Appellee's trial counsel had ordered for these hearings. No other hearings or transcripts took place or were available pursuant to the docket or the records or Appellant's trial counsel. Thus, it is Appellant's position that the record is complete as to the hearings regarding the evidentiary hearing on the Motion to Vacate Default, and that no other hearings on this matter took place.

B. The trial court erred in setting aside the default and vacating the default judgment against the Williamses as they were properly served and aware of the lawsuit in compliance with their due process rights

The Williamses Due process rights were not denied when they acknowledge being properly served and aware of the lawsuit against

them yet never responded to anything after they're motion for extension to respond to the complaint was granted. As stated earlier and in the Initial Brief, the Williamses admit to being properly served and being aware of the lawsuit against them.¹⁴ Thus they were subject to the trial court's jurisdiction and it was their own failure to act which caused the entry of the default and default judgment. It is also undisputed that UNIVERSAL properly effectuated service of all documents through the E-Filing Portal. Once the documents are submitted as such, they are deemed properly served. The Williamses do not counter this at all in their Amended Answer Brief, nor do they address how Cuenant had his correct email on the E-Filing Portal but did not receive any of the over 47 documents submitted via the Portal, or of the documents mailed to him or the Williamses. Nor do they address why they took no action for over five years of litigation, of which they were aware, nor why they took no action upon "discovery" of the garnishment of

¹⁴ App #4 and 5.

Mr. William's wages in April of 2023, but that the motion to vacate default was not filed until August 17, 2023.¹⁵

The cases cited by UNIVERSAL in its Initial Brief, *Decker v. Kaplus*, 763 So.2d 1229 (Fla. 5th DCA 2000); and *Kozinski v. Phillips*, 126 So.3d 1264 (Fla. 4th DCA 2013); are relevant to this Court's analysis. As pointed out by the Williamses, these cases did deal with service of process, but they were cited for the propositions that a total lack of service of process renders a judgment void, not voidable, and that the Williamses were properly served, and thus they were aware of the proceedings, and they had a duty to act. They could not sit idly by for five years, knowing they were involved in a lawsuit, and then attempt to raise the issue of the judgment being void, when they themselves made no effort whatsoever, to even check a docket. Even further having been properly served with all of these documents via the E-Filing Portal.

The Williamses do not address these issues in their Amended Answer Brief. They focus instead on what was said at the evidentiary hearing to absolve themselves without actually

¹⁵ App #36.

discussing the substance. Because they cannot argue with the facts that they knew of the lawsuit, and their attorney was properly served with all of the documents through the E-Filing Portal, and they took no action.

Instead, the Williamses cite to caselaw in their brief to justify their inaction. All of the cases are distinguishable, as none of them dealt with a situation such as the one at bar, where the defendants had been properly served, their attorney had filed a notice of appearance and a Motion for Extension of Time, received the order granting the extension of time via E-File at his listed service email and took no further action. He did not file any document in response to that order, nor responded to any of the over 47 docket entries submitted to him via the E-Filing system by the multiple parties. None of the cases they cite absolve them from their inaction.

Vercosa v. Fields, 174 So.3d 550 (Fla. 4th DCA 2015), is distinguishable. It dealt with a party that had been defaulted as to liability for failure to reply to the complaint. Yet the issue of liquidated damages remained. The trial was set on the liquidated

damages, but when the defaulted party arrived, the room of the trial had been moved without telling them and the trial occurred without them in the interim. Very specific factual pattern which clearly demonstrated a lack of fairness towards the defaulted party. But it was in the narrow circumstance of fair notice to a defaulted party as to the trial on the liquidated damages. As this Court stated; “In Florida, it is well settled that a defaulting party is entitled to notice and an opportunity to be heard when the damages are unliquidated. *Rodriguez-Faro v. M. Escarda Contractor, Inc.*, 69 So.3d 1097, 1098 (Fla. 3d DCA 2011).” Not relevant to the case at bar.

Likewise in *Richard v. Bank of America, N.A.*, 258 So.3d 485 (Fla. 4th DCA 2018), the fact pattern is distinguishable. In Richard the Bank moved for default, and two days later, the Richards moved to dismiss the complaint. While that motion was pending, the bank moved for a default judgment on March 17, 2011. The bank withdrew its motion for default judgment less than two weeks later. On April 1, 2011, the bank filed a response to the motion to dismiss and moved for leave to amend the complaint. On May 9, 2011, while

the motion to dismiss and motion to amend the complaint were pending, the bank moved for summary judgment. Four days later the court entered an order granting a motion for default judgment against the borrowers. Although the title indicated that it was granting default, the body of the order granted summary judgment. No summary judgment hearing was held. This Court found that the entry of summary judgment, four days after the motion was filed and with no hearing was a deprivation of due process and that the order was void. Richards is clearly not relevant to the analysis in the case at bar. It dealt with an active participation in the litigation by the Richards, and a summary judgment entered with no notice, or hearing, a mere four days after the motion had been filed.

Likewise, the other cases cited by the Williamses are not applicable to the case at bar. Although in *Estrada v. Estrada*, 274 So.3d 426 (Fla. 3d DCA 2019), a case in which as in the case at bar, the trial court vacated a default and default final judgment, the Third District stated in pertinent part, “[M]oreover, pursuant to Florida Rules of Civil Procedure 1.540(b)(1), 1.540(b)(2), and 1.540(b)(3), voidable judgments must be challenged by motion no

later than one year after entry of judgment. In the case before us, appellees filed a notice of appearance and an unverified motion to set aside void default and default judgment on April 28, 2017, which is in excess of one year after entry of judgment by the trial court. As a result of appellees' non-compliance with the time requirements of rule 1.540(b), their motion to set aside void default and default judgment should not have been granted, even as a voidable judgment.” *Estrada v. Estrada*, 274 So.3d 426, at 430, (Fla. 3d DCA 2019).

Clearly, the cases cited by the Williamses have no bearing on the case at bar, where the Williamses acknowledge service of the complaint, their attorney filed a notice of appearance and a motion for extension of time in which to respond to the complaint, which said motion was granted, and the attorney never took any other action for five years, despite being properly e-served by all parties throughout the litigation.

C. The trial court was in error in setting aside the default and vacating the default judgment because the Williamses did not meet the three-prong test for setting aside a default.

The three prong test is immaterial once this Court determines that the judgment was not void. Even though, however, it is clear that the Williamses' Motion to Vacate Default Final Judgment should not have been granted because they failed to meet the prongs required to set aside the judgment, as fully discussed in UNIVERSAL's Amended Initial Brief.

No Excusable Neglect

As discussed at length in the Initial Brief, the Williamses did not establish excusable neglect. In fact, they took no action whatsoever over the course of the five years of litigation despite their knowledge of the pending litigation. And, as argued in the Initial Brief, even if assuming arguendo, that the Williamses did not know of any of the events transpiring in the litigation, once Mr. William's wages were being garnished, and he knew that this was happening in April, as stated in Defendants' Motion to Vacate, they did nothing.

This Court should follow *Trinka* and conclude that the Williamses failure to do anything throughout the litigation, especially after they admit notice in April or May, 2023, amounted

to an intentional failure to act and that their intentional failure to act is not excusable neglect. Therefore, because Defendants' Motion to Vacate did not establish excusable neglect by Defendants or Cuenant, it was legally insufficient and should have been denied.

2. Lack of Due Diligence

As stated in the Amended Initial Brief, Appellees, admit that by April of 2023, they knew that Mr. Williams' paycheck was being garnished by UNIVERSAL. However, it took them almost three months for the Motion to Vacate to be filed. This, in conjunction with the Williamses failure to do anything during the five years of litigation, was a clear sign of lack of due diligence. *See Kalb v. The Sail Condominium Association, Inc.* 112 S0.3d 674 (Fla 3rd DCA 2013).

Here, because it took Defendants nearly three months to move to set aside the default and have yet to file a sworn, alleged meritorious defense, Defendants did not act with due diligence.

3. Statement of Meritorious Defenses

Appellant, as stated in its Amended Initial Brief, believes that Defendants did not establish its meritorious defenses in its Motion to Vacate. As to the meritorious defenses, as discussed at length, were not properly presented as required by the caselaw. ("A meritorious defense is established where a 'proposed answer is attached to its motion to vacate, which answer sets out in detail a number of affirmative defenses.' *Fortune Ins. Co. v. Sanchez*, 490 So.2d 249, 249 (Fla. 3d DCA 1986)." *Elliott v. Aurora Loan Servs. LLC*, 31 So.3d 304 (Fla. App. 2010)). *See also, Mathews Corp., v. Green Pool Services* 584 So. 2d 1006 (Fla.3d DCA 1990)(finding unsworn proposed answer to be insufficient to establish meritorious defense).

As demonstrated above, at no time did Defendants establish all of the necessary elements required for the trial court to set aside the default judgment.

III. CONCLUSION

For the reasons stated above the order of the trial court granting the Motion to Vacate should be reversed, and the judgment should be reinstated in its entirety.

Respectfully Submitted,

/s/ Carlos Cruanes
CARLOS CRUANES, ESQ.
Florida Bar No.: 121940

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the E-Filing Portal to all attorneys of record; Morgan L. Weinstein, Esq., and Terra L. Sickler, Esq., Attorney for Appellee at service@twiglawn.com; and Winston Cuenant, Esq., at winston@cuenantlaw.com.

Dated: September 16, 2024
Respectfully submitted,

CARLOS CRUANES, ESQ.
Andreu, Palma, Lavin & Solis, PLLC
815 N.W. 57th Avenue, Suite 401
Miami, FL 33126
Tel. (305) 631-0175
Fax. (305) 631-1816

_____/S/_____
CARLOS CRUANES, ESQ.
Florida Bar No.: 121940
E-mails: ccruanes@andreupalma.com;
pleadings2@andreupalma.com;

APPELLANT'S RULE 9.210 CERTIFICATE

I HEREBY CERTIFY this brief complies with Fla.R.App.P. 9.210 font and type standards. I have used Bookman Old Style type, size 14 point, and the Reply Brief minus the cover sheet, the tables of contents and citations, the certificates of service and compliance, and the signature block, is 3464 words long.

CARLOS CRUANES, ESQ.
Law Offices of Andreu, Palma,
& Andreu, PL
815 N.W. 57th Avenue, Suite 401
Miami, FL 33126
Tel. (305) 631-0175
Fax. (305) 631-1816

/s/ Carlos Cruanes
CARLOS CRUANES, ESQ.
Florida Bar No.: 121940