

IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 4D23-1181
LT CASE NO. CONO21020793

CLEARCARE, LLC, a/a/o
VERNALD CHEESE,

Appellant,

vs.

ALLSTATE INDEMNITY COMPANY,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Appellant Clearcare LLC as assignee of Vernald Cheese (“Clearcare”), hereby appeals and seeks reversal of the trial court’s non-final Order granting Appellee Allstate Insurance Company (“Allstate”)’s Motion to Vacate Default.

The primary issue raised in this appeal is whether the trial court erred in granting Allstate’s motion to vacate where Allstate only submitted an unverified answer and an unnotarized, barebones affidavit as proof of its “excusable neglect” and “due diligence.”

Based upon the arguments presented herein, Clearcare respectfully requests this Court reverse the trial court’s order granting Allstate’s motion to vacate default and remand with instructions to reinstate its previously entered default final judgment.

For the purposes of this brief, “(App. __)” refers to the appendix to the initial brief.

STATEMENT OF THE CASE AND OF THE FACTS

On June 24, 2021, Clearcare filed the instant breach of contract action against Allstate to recover outstanding personal injury protection (“PIP”) benefits owed by Allstate to Clearcare for medical services provided by Clearcare to Allstate’s insured, Vernald Cheese. (App. 4-9) Clearcare’s complaint identified Allstate’s insured and Clearcare’s assignee, Mr. Cheese, the date of loss, and the basis for its demand for PIP benefits. (App. 4-9) On the same day, the lower court’s clerk issued a summons. (App. 10-12) Clearcare subsequently served that summons on Allstate through the Chief Financial Officer of the State of Florida, which forwarded the subject complaint and summons via electronic service to Allstate’s designated agent on July 2, 2021. (App. 13) Allstate did not file any documents, responsive to Clearcare’s complaint or otherwise, with the court.

On December 10, 2021, 161 days after service of the lawsuit on Allstate, Clearcare filed a motion for default. (App. 14) Shortly thereafter, the trial court entered an Order Granting Default against Allstate. (App. 15) On December 15, 2021, 166 days after service on Allstate, Clearcare moved for entry of default final judgment against Allstate. (App. 16-17) After an uncontested hearing, the trial court

entered an Order on Plaintiff's Motion for Entry of Final Judgment on February 23, 2022, 236 days after service of the lawsuit on Allstate. (App. 18) In support of default final judgment, Clearcare filed the affidavit of its corporate representative attesting to the damages suffered by Clearcare due to Allstate's breach. (App. 19-24)

On January 25, 2023, 572 days after service on Allstate, 407 days after the trial court entered default, and 336 days after the trial court entered default final judgment, Allstate filed an unverified motion to vacate default, stating its "systems to track incoming litigation and assign it to defense counsel...did not work properly, and this suit went into default." (App. 25-33) Allstate's motion contended that its "failure to enter an appearance and subsequently resulting default was due to a mistake, inadvertence, and excusable neglect, but was not due to culpable negligence." (App. 25) Allstate further asserted, "[t]he undersigned counsel received assignment of this suit after the [sic] it had been brought to Allstate's attention that a default had been entered" and that "[s]hortly after receiving the assignment of this suit, the undersigned counsel's office filed a Notice of Appearance in this matter." (App. 26) Allstate simultaneously filed

the notice of appearance of its counsel and answer. (App. 34-35, 36-38)

On the eve of the parties' hearing on Allstate's motion to vacate default, 647 days after service on Allstate, Allstate filed the unnotarized affidavit of a litigation adjuster who attested the suit was initially referred to outside counsel, but Allstate failed to reassign it to in-house counsel once outside counsel rejected it. (App. 43-44)

At hearing, the trial court summarized the legal requirement that Allstate must satisfy the three prongs of timeliness, excusable neglect, and a meritorious defense. (App. 57/19-24) The trial court then held Allstate's motion to vacate was timely because Allstate filed it within one year of the trial court's order for final judgment. (App. 57/25-58/9) Addressing excusable neglect, Allstate's counsel asserted that Allstate initially referred the case to outside counsel, which rejected it, and Allstate failed to reassign the case. (App. 58/10-19) Allstate's counsel also claimed that Allstate did not discover the default and default final judgment until "recently, very recently" and subsequently assigned defense counsel on January 24, 2023. (App. 58/20-59/4) Allstate's counsel further asserted it had a meritorious defense. (App. 59/5-20) When questioned by the trial

court about the specific failures of collapse of Allstate's process for assigning defense counsel, Allstate's counsel could not offer any details about what occurred between outside counsel and Allstate after outside counsel's rejection of the file. (App. 59/21-61/15)

In response, Clearcare's counsel disputed Allstate's timeliness argument, citing the default order being entered in December 2021 and the final judgment being granted in February 2022 with the motion to vacate not being filed until January 2023. (App. 61/16-62/2) Clearcare's counsel also argued the affidavit was last-minute, "barebones," lacked detail, and "deficient" before further noting Allstate's answer was also unverified. (App. 62/3-18) After hearing arguments, the trial court granted Allstate's motion to vacate, finding "the affidavit is sufficient" and citing "a general policy within the state of Florida that matters in litigation should be resolved based on the merits of the case and not...technical procedural issues." (App. 62/19-63/2)

The trial court subsequently issued its Order without further findings, vacating the default final judgment and deeming Allstate's answer timely filed. (App. 45-46)

This appeal follows. (App. 47-51)

STANDARD OF REVIEW

This Court has jurisdiction to review non-final orders that provide relief from judgments pursuant to Fla. R. App. Pro. 9.130(a)(5). An order granting a Fla. R. Civ. Pro. 1.540(b) motion to vacate a default final judgment is reviewed under the standard of gross abuse of discretion. *Halpern v. Houser*, 949 So. 2d 1155 (Fla. 4th DCA 2007); *Bequer v. Nat'l City Bank*, 46 So. 3d 1199 (Fla. 4th DCA 2010). However, when there is no factual dispute and the trial court's ruling is made as a matter of law, the standard of review is *de novo*. *Fernandez v. Difiore*, 279 So. 3d 174 (Fla. 4th DCA 2019).

SUMMARY OF THE ARGUMENT

A default final judgment may be set aside if a movant establishes: (1) excusable neglect in failing to timely file a response; (2) a meritorious defense; and (3) due diligence in seeking relief after discovery of the default. The movant must submit an affidavit or sworn evidence demonstrating its compliance with the “excusable neglect” and “due diligence” prongs. Failure to do so is fatal to the movant's cause.

In this case, Allstate did not file any sworn evidence of its alleged “excusable neglect” and “due diligence” as required to vacate a

default final judgment pursuant to Fla. R. Civ. Pro. 1.540(b). Instead, Allstate filed an unverified answer and an unnotarized affidavit in support of its motion to vacate. Further, even if considered, Allstate's unnotarized affidavit lacked any of the necessary details for a court to determine excusable neglect and due diligence. The assertions of Allstate's counsel at the trial level should not be considered evidence.

As such, Allstate did not demonstrate its failure to timely respond to the complaint was the result of "excusable neglect" nor did it demonstrate any due diligence in filing the motion to vacate 11 months after the trial court entered default final judgment. Because Allstate has failed its burden set forth in Fla. R. Civ. Pro. 1.540(b), the trial court's order granting Allstate's motion to vacate should be reversed and this matter remanded to the trial court with instructions to reinstate the default final judgment.

ARGUMENT

I. THE TRIAL COURT’S ORDER VACATING THE DEFAULT FINAL JUDGMENT SHOULD BE REVERSED.

To set aside a default final judgment for failure to file responsive pleadings under Fla. R. Civ. P. 1.540(b), “the trial court must determine (1) whether the defendant has demonstrated excusable neglect in failing to respond; (2) whether the defendant has demonstrated a meritorious defense; and (3) whether the defendant, subsequent to learning of the default, has demonstrated due diligence in seeking relief.” *Halpern*, 949 So. 2d at 1157; *see also*, *Lanza v. Allied Trucking of Fla., Inc.*, 930 So. 2d 633, 634 (Fla. 3d DCA 2006). “The failure of the defendant to satisfy any one of these elements must result in a denial of the motion to set aside the default.” *Lehner v. Durso*, 816 So. 2d 1171, 1173 (Fla. 4th DCA 2002) (*quoting Schwartz v. Bus. Cards Tomorrow, Inc.*, 644 So. 2d 611, 611 (Fla. 4th DCA 1994)) (emph. added).

Because Allstate did not establish each of the required elements supporting a motion to vacate a default judgment, the trial court’s order granting its motion to vacate should be reversed and this matter remanded with instructions to reinstate the default final

judgment.

A. The Trial Court Erred in Ruling that Allstate Demonstrated “Excusable Neglect.”

In granting Allstate’s motion to vacate default, the trial court erred by determining that Allstate demonstrated excusable neglect despite its only “evidence” being an unnotarized, barebones affidavit and arguments by counsel as to why Allstate did not file its motion to vacate default for 11 months after the trial court entered default final judgment against it.

This Court has previously explained that “[e]xcusable neglect is found ‘where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir...’” *Elliott v. Aurora Loan Servs., LLC*, 31 So. 3d 304, 307 (Fla. 4th DCA 2010) (quoting *Somero v. Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985)). Given the considerable caselaw addressing excusable neglect, this Court has found the caselaw presents a “pattern...best stated negatively”:

a default will not be set aside where the defaulted party or his attorney (1) simply forgot or (2) intentionally ignored the necessity to take appropriate action; that is to say, where the conduct could reasonably be characterized as

partaking of gross negligence or as constituting a willful and intentional refusal to act. The failure to state any factual grounds upon which the movant relies has also been held to be an insufficient basis for setting aside a default.

Somero, 467 So. 2d 1103 at 1105-06. “In order to show excusable neglect, the moving party must produce sufficient evidence of mistake, accident, excusable neglect or surprise as contemplated by rule 1.540(b) before the court's equity jurisdiction may be invoked.” *Rodriguez v. Falcones*, 314 So.3d 469, 471-72 (Fla. 3d DCA 2020). Importantly, “[t]o demonstrate excusable neglect, the defendant must by affidavit or other sworn statement set forth facts explaining the mistake or inadvertence.” *Gibraltar Serv. Corp. v. Lone & Assocs., Inc.*, 488 So. 2d 582, 584 (Fla. 4th DCA 1986); *see also*, *Universal Prop. & Cas. Ins. Co. v. Dimanche*, 338 So. 3d 408 (Fla. 3d DCA 2022) (“Excusable neglect must be proven by an affidavit or other sworn statement”).

In the absence of a sworn statement, courts are “precluded from considering as fact unproven statement documented only by an attorney.” *Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd.* 636 So. 2d 838, 840 (Fla. 2d DCA 1994). Indeed, this Court has condemned this practice by trial courts:

Fourth, the practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.

Leon Shaffer Golnick Advert., Inc. v. Cedar, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982) (emph. added.)

In the instant matter, Allstate filed an unverified motion to vacate default, and, in support of the motion, Allstate belatedly submitted an unnotarized affidavit of Allstate's litigation adjuster on the eve of the parties' hearing. (App. 25-33, 41-44) The unnotarized affidavit simply listed the unauthenticated attestations of an Allstate employee that only amounted to conclusory statements that Allstate's failure to reassign its file constituted "mistake, inadvertence, or excusable neglect" sans details and dates. (App. 41-44) It therefore fell to Allstate's counsel, rather than Allstate, to attempt to provide the trial court with any specifics about Allstate's alleged excusable neglect. (App. 52-72) Accordingly, the trial court's

oral finding at hearing that Allstate's affidavit was "sufficient" and ruling that Allstate had demonstrated excusable neglect is improper. (App. 62/19-21) An unverified answer is not a sworn statement. An unnotarized affidavit is not a sworn statement.¹ The unstipulated argument of counsel is not a sworn statement.

In *DiSarrio v. Mills*, 711 So. 2d 1355, 1356 (Fla. 2d DCA 1998), the Second District reviewed a trial court order granting appellee's motion to set aside for excusable neglect an earlier order for sanctions and dismissal after appellee's attorney failed to attend a scheduled pretrial conference. After noting Fla. R. Civ. P. 1.540(b) requires a legal excuse and meritorious defense, the Second District rejected the trial court's acceptance of appellee's attorney's "unsworn and unverified explanation" as "error." *DiSarrio*, 711 So. 2d 1355 at 1356. The Second District explained:

Excusable neglect must be proven by sworn statements or affidavits. See *Schauer*, 639 So. 2d at 638-39. *Unsworn assertions of excusable neglect are insufficient...* Counsel for the [Appellees] neither offered a verified motion nor

¹ Section 92.50(1), Fla. Stat. requires an affidavit include "[t]he jurat, or certificate of proof or acknowledgment, shall be authenticated by the signature and official seal of such officer or person taking or administering the same." Allstate's affidavit of Ms. Summers has no such authentication. (App. 43-44)

testified under oath. Allegations of excusable neglect require more than mere legal conclusions...Argument by counsel who is not under oath is not evidence... Thus, the failure to verify the claim of excuse is fatal.

Id., 711 So. 1355 at 1356-57. (emph. added) Accordingly, the Second District reversed the trial court's order finding excusable neglect and reinstated the original dismissal of appellee's suit. *Id.* at 1357.

As an evidentiary proceeding, the trial court's findings for Allstate's motion to vacate could not go beyond those contained in the Record evidence. Because Allstate failed to submit the required sworn statement in support of its claim of excusable neglect, there is nothing in the Record evidence to support the trial court's vacating the default judgment. Therefore, the order granting Allstate's motion to vacate default should be reversed and this matter remanded with instructions to reinstate the default final judgment.

B. The Trial Court Erred in Ruling that Allstate Demonstrated "Due Diligence."

For largely the same reasons as above, the trial court also erred in granting Allstate's motion to vacate default by finding that Allstate demonstrated "due diligence".

Due diligence is a test of reasonableness that "must be evaluated in terms of the particular case under consideration."

Franklin v. Franklin, 573 So. 2d 401, 403 (Fla. 3d DCA 1991). A party's requirement of due diligence stems from the understanding that "swift action must be taken upon first receiving knowledge of any default." *Westinghouse Credit Corp. v. Steven Lake Masonry, Inc.*, 356 So. 2d 1329, 1330 (Fla. 4th DCA 1978). Such requirement "is directly related to the reasons for the entry of the default in the first place—to provide for prompt disposition of legal proceedings." *Techvend v. Phoenix Network, Inc.*, 564 So. 2d 1145, 1146 (Fla. 3d DCA 1990).

As with Fla. R. Civ. P. 1.540(b)'s "excusable neglect" prong, this Court has held that "[d]ue diligence must be established with evidence, which includes a sworn affidavit." *Elliott*, 31 So. 3d 304 at 308; *see also, Cedar Mountain Estates, LLC v. Loan One, LLC*, 4 So.3d 15, 17 (Fla. 5th DCA 2009) ("We recognize that excusable neglect and due diligence must ultimately be established with evidence—either sworn testimony or affidavits..."); *Roberts v. Safeway Ins. Co.*, 610 So. 2d 700, 701 (Fla. 3d DCA 1992) (reversing an order denying a motion to vacate default judgment where defendant's "affidavit establishes that [defendant] exercised due diligence under the circumstances"); *Bank of N.Y. Mellon v. P2D2, Ltd. Liab. Co.*, 100 So.

3d 205, 208 (Fla. 2d DCA 2012). Like “excusable neglect,” “[u]nsworn argument of counsel is insufficient to satisfy the due diligence element of a motion to vacate a default final judgment.” *Lazcar Int’l, Inc. v. Caraballo*, 957 So. 2d 1191, 1192 (Fla. 3d DCA 2007); *State v. Bauman*, 425 So. 2d 32, 35 n.3 (Fla. 4th DCA 1982) (“We say again that facts are not established for consideration by the trial court or by appellate review when attorneys make representations in their arguments before the trial court. Facts are established by testimony, affidavits and stipulations. It is of no moment in establishing facts that attorneys are ‘officers of the court’ as we so often read when an unsworn representation is made.”).

Once again, Allstate failed to meet the evidentiary threshold required by Florida law by filing no sworn statement to prove due diligence. Further, Allstate did not even offer an unverified explanation for the 11-month delay between the trial court’s default final judgment and its filing a motion to vacate nor the further 75-day delay in filing the unsworn affidavit of Ms. Summers. Upon review, the unauthenticated attestations of Allstate’s employee simply claim Allstate “timely referred” the underlying lawsuit to one firm but suffered “breakdown in normal processes”; however, it fails

to provide any detail regarding the timeframe for when Allstate became aware of the default or default final judgment, when it subsequently alerted staff counsel, or how long after it alerted staff counsel that the motion to vacate was filed. No claim of “due diligence” is even made by Allstate. Once more, the only attempt at providing details was the unsworn arguments by Allstate’s counsel in the motion to vacate and at the subsequent hearing. From this, it can only be asserted that Allstate either intentionally, or with gross negligence, failed to act with due diligence to protect its rights. *See, Lazcar*, 957 So. 2d 1191 at 1193. (“here, there is no competent evidence of any circumstance, exceptional or not, explaining the delay. However, even if the unsworn argument of defense counsel at the hearing on the motion to vacate is considered, the order under review still fails. We find nothing said by defense counsel to be graspable by Caraballo as an ‘exceptional circumstance’ to explain the delay.”) Accordingly, the trial court’s ruling that Allstate demonstrated due diligence—without providing any legal basis—is improper.

In *Hepburn v. All Am. Gen. Constr. Corp.*, 954 So. 2d 1250, 1252 (Fla. 4th DCA 2007), this Court found that “absent competent

substantial evidence of some exceptional circumstances explaining the delay, a six-week delay in filing a motion to vacate a default judgment after receiving a notice constitutes a lack of due diligence as a matter of law.” (citing *Lazcar*); see also, *Bayview Tower Condo. Assn. v. Schweizer*, 475 So. 2d 982, 983 (Fla. 3d DCA 1985) (“this [month’s] delay showed a lack of due diligence in seeking relief after learning of the default and was fatal to the subject motion to vacate filed below”); *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So. 2d 300, 304 (Fla. 2d DCA 2004) (“the seven-week delay here was unreasonable”); *Trinka v. Struna*, 913 So. 2d 626, 628 (Fla. 4th DCA 2005) (“defendant’s attorney ignored his duty to act with all due diligence” where “more than a month passed between the discovery of the default and the entry of the final judgment without any attempt to vacate the default”); *Seay Outdoor Advert., Inc. v. Locklin*, 965 So. 2d 325, 329 (Fla. 1st DCA 2007) (“Because no reason for the ten-week delay was given, no due diligence was shown”).

As an evidentiary proceeding, the trial court’s findings for Allstate’s motion to vacate could not go beyond those contained in the Record evidence. As the Record has no explanation for the 11-month delay in filing its motion to vacate or how Allstate’s extreme

inaction during this extensive delay demonstrated due diligence, there is nothing in the Record evidence to support the trial court's vacating the default judgment. Therefore, the order granting Allstate's motion to vacate default should be reversed and this matter remanded with instructions to reinstate the default final judgment.

CONCLUSION

For the foregoing reasons, Clearcare respectfully requests that this Court reverse the trial court's order granting Allstate's motion to vacate default and remand this case to the trial court with instructions to reinstate the default final judgment.

Respectfully Submitted this 18th day of September 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Florida Rules of Appellate Procedure 9.210(a)(2), I hereby certify that this brief is proportionally spaced, 14-point Bookman Old Style font. Per Microsoft Word software, this brief contains less than the maximum wordcount for argument, excluding those pages exempted by Florida Rule of Appellate Procedure, 9.210(a)(5).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18, 2023, a true and correct copy of the foregoing document was filed with the clerk of court using the Florida Courts E-Filing Portal, and a copy has been thereby furnished to Anthony J. Parrino, Esquire (aparrino@rpslaw.net; ajpfilings@rpslaw.net).

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