

DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Nationstar Mortgage, LLC v. Steven Prine and Courtney Saucier

179 So. 3d 409 (Fla. 3d DCA 2015) · No. 3D14-2941 · Decided November 12, 2015

SUMMARY

The Florida Third District Court of Appeal held that Nationstar Mortgage, LLC was entitled to relief from a foreclosure dismissal because the clerk transmitted the trial notice to an incorrect email address. The court concluded that Nationstar's lack of adequate notice constituted excusable neglect and a due process violation, reversed the dismissal, and remanded for a new trial.

CASE DETAILS

COURT	District Court of Appeal of Florida, Third District
WRITING FOR THE COURT	Fernandez, J.; Wells, J.; Salter, J.
JURISDICTION	Florida
DECIDED	November 12, 2015
DOCKET	3D14-2941
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Nationstar appealed a final order denying its Florida Rule of Civil Procedure 1.540(b) motion to vacate an order dismissing its mortgage foreclosure action.
STANDARD OF REVIEW	Abuse of discretion for an order ruling on a motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b).
PRECEDENTIAL VALUE	Published opinion; precedential value under Florida law
PARTIES	Nationstar Mortgage, LLC v. Steven Prine, Courtney Saucier

TOPICS

[foreclosure](#) [civil procedure](#) [appellate procedure](#) [standard of review](#) [remedies](#)

PRACTICE AREAS

[Mortgage foreclosure](#) [Civil procedure](#) [Appellate procedure](#) [Due process](#)

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by summarily denying Nationstar's Rule 1.540(b) motion to vacate the dismissal when Nationstar did not receive the trial notice because of the clerk's erroneous email transmission.
2. Whether the lack of proper notice and adequate preparation time violated Nationstar's due process right to notice and an opportunity to be heard.
3. Whether Nationstar's failure to secure a trial witness under these circumstances constituted excusable neglect.

HOLDINGS

1. The trial court abused its discretion by summarily denying Nationstar's motion to vacate the dismissal because Nationstar's failure to prepare for trial was excusable neglect caused by the clerk's erroneous transmission of the trial notice.
2. A party's failure to receive proper notice of trial because of a clerk's transmittal error violates the party's due process right to fair notice and an opportunity to be heard, and requires reversal of a dismissal entered under those circumstances.

KEY QUOTATIONS

"We reverse the order of dismissal and remand for a new trial because Nationstar had a due process right to the notice of trial, which it did not receive when the trial court clerk erroneously transmitted the notice for service to an incorrect e-mail address." (at 1)

"The failure of service is tantamount to a due process violation." (at 4)

FACTUAL BACKGROUND

Nationstar sought to foreclose on a mortgage executed by Steven Prine and Courtney Saucier. The trial court scheduled the case for trial and correctly identified Nationstar counsel's email address in the trial-setting order, but the clerk transmitted the notice to an incorrect address. Counsel learned of the trial only five days beforehand, could not secure a witness on short notice, and appeared to request a continuance. The trial court denied the continuance and dismissed the foreclosure action for failure to produce a witness.

PROCEDURAL HISTORY

The trial court set the foreclosure case for trial and directed the clerk to transmit notice to counsel. Because the clerk sent the notice to an incorrect email address, Nationstar's counsel did not learn of the trial until five days before it began. The trial court denied Nationstar's requested continuance, dismissed the action when Nationstar could not produce a witness, and summarily denied Nationstar's motion to vacate. The Third District reversed and remanded for a new trial.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the order of dismissal and remand for a new trial.

CASES CITED

- Barco Holdings, LLC v. Terminal Inv. Corp., 967 So. 2d 281, 295 (Fla. 3d DCA 2007)
- DeBello v. Faske, 668 So. 2d 324, 325 (Fla. 3d DCA 1996)
- World on Wheels of Miami, Inc. v. Int'l Auto Motors, Inc., 569 So. 2d 836, 837 n.1 (Fla. 3d DCA 1990)
- Ciolli v. City of Palm Bay, 59 So. 3d 295, 297 (Fla. 5th DCA 2011)
- Schuman v. Int'l Consumer Corp., 50 So. 3d 75, 76-77 (Fla. 4th DCA 2010)
- Mourning v. Ballast Nedam Constr., Inc., 964 So. 2d 889 (Fla. 4th DCA 2007)

OPINION

FERNANDEZ, J.

Third District Court of Appeal State of Florida Opinion filed November 12, 2015. Not final until disposition of timely filed motion for rehearing. _____ No. 3D14-2941 Lower Tribunal No. 08-2130-K _____ Nationstar Mortgage, LLC, Appellant, vs. Steven Prine and Courtney Saucier, Appellees. An Appeal from the Circuit Court for Monroe County, Sandra Taylor and James M. Barton, Senior Judges.

Akerman, LLP, Nancy M. Wallace (Tallahassee); William P. Heller and Henry H. Bolz (Fort Lauderdale), for appellant. Jay M. Levy, for appellees. Before WELLS, SALTER and FERNANDEZ, JJ. FERNANDEZ, J. Nationstar Mortgage, LLC, appeals a final order denying its motion to vacate order of dismissal in this mortgage foreclosure case.

We reverse the order of dismissal and remand for a new trial because Nationstar had a due process right to the notice of trial, which it did not receive when the trial court clerk erroneously transmitted the notice for service to an incorrect e-mail address. Nationstar sought to foreclose on a mortgage that appellees Steven Prine and Courtney Saucier executed.

The trial court issued its Order Setting Cause for Trial by Court and Directing Pretrial Procedure on June 24, 2014. The court scheduled the trial for August 12, 2014. The order directed the court clerk to e-mail copies to counsel and correctly designated Nationstar's counsel's e-mail address for service.

The transmittal of the notice, however, effectuated service upon an incorrect e-mail address for Nationstar's counsel. Nationstar's counsel learned of the trial when he reviewed the court on-line docket on August 7, 2014, five days before the scheduled trial. Nationstar appeared at trial on August 12, 2014 and requested a continuance, arguing that it had not received the court's order setting the case for trial, and that it was unable to produce a witness on such short notice.

Nationstar advised the court that it had tried to procure a witness, but none was available. The court denied the motion to continue the trial and dismissed the action as a result of Nationstar's failure to produce a witness at trial. Nationstar moved to vacate the dismissal pursuant to rule 1.540(b), Florida Rule of Civil Procedure, alleging that it had no knowledge of the trial until August 27, 2014 and did not have adequate time to properly prepare for trial.

Opposing counsel argued in its response that Nationstar failed to establish mistake or inadvertence; and that the notice of trial was e-mailed to Nationstar's counsel at the e-mail address designated on the clerk's transmittal copy, attached to his response, which clearly indicated Nationstar's counsel's incorrect e-mail address.

The trial court summarily denied Nationstar's motion. This constituted an abuse of discretion. See *Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281, 295 (Fla. 3d DCA 2007)(stating that "[o]ur standard of review of an order 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.").

Nationstar's failure to adequately prepare for trial constituted excusable neglect. Florida Rule of Civil Procedure 1.540(b)(1) authorizes a trial court to relieve a party from a final judgment, decree, order, or proceeding based upon mistake, inadvertence, surprise, or excusable neglect. It is undisputed that Nationstar's counsel did not receive the notice of trial.

The record reflects, as opposing counsel noted in his response to Nationstar's motion to vacate, that the court clerk erroneously transmitted the trial order to an incorrect e-mail address for Nationstar's counsel. Nationstar's inability to secure a trial witness and thereby adequately prepare for trial was thus plainly excusable. See *DeBello v. Faske*, 668 So.

2d 324, 325 (Fla. 3d DCA 1996). Although a presumption of good service arises from a certificate of service on a court order, see *World on Wheels of Miami, Inc. v. Int'l Auto Motors, Inc.*, 569 So. 2d 836, 837 n.1 (Fla. 3d DCA 1990), the presumption of good service is rebuttable where, as here, there was a transmittal error of the trial order and the record is devoid of any evidence that Nationstar's counsel received the trial order.

See *Ciulli v. City of Palm Bay*, 59 So. 3d 295, 297 (Fla. 5th DCA 2011)(stating that, "[w]hile proof of mailing normally raises a rebuttable presumption that the mailed item was received, no such presumption arises when there is no evidence that the mailed item was sent to the correct address"). Nationstar successfully rebutted any possible presumption of service.

The failure of service is tantamount to a due process violation. Due process requires fair notice and opportunity to be heard before judgment is rendered. See *Schuman v. Int'l Consumer Corp.*, 50 So. 3d 75, 76-77 (Fla. 4th DCA 2010). Florida Rule of Civil Procedure 1.440(c) mandates that a trial be set not less than thirty days from the service of the notice for trial.

Mourning v. Ballast Nedam Const., Inc., 964 So. 2d 889 (Fla. 4th DCA 2007). Nationstar's inability to adequately prepare for trial was reasonably attributable to the failure of adequate and proper notice of trial. Nationstar's counsel neither received notice of trial nor 4 adequate time within which to prepare for trial. Nationstar's counsel learned of the trial five days before the start of trial, an obvious inadequate amount of time within which to prepare and a clear violation of the underlying principle inherent in rule 1.440(c).

Nationstar's counsel nonetheless appeared on the day of trial and requested a continuance without any knowledge that his failure to receive the notice of trial was the result of the court clerk's typographical error. It is not surprising that Nationstar's counsel was unable to secure a trial witness.

We therefore reverse the order of dismissal and remand for a new trial. REVERSED and REMANDED. 5