

FLORIDA COURT OF APPEALS, FOURTH DISTRICT

David Green v. Renee Polukoff and Allstate Insurance Company

Green v. Polukoff, No. 4D2022-2818, 2024 WL 211077 (Fla. Dist. Ct. App. Jan. 17, 2024) · No. 4D2022-2818

SUMMARY

The Florida Fourth District Court of Appeal held that a motion to appoint a guardian ad litem, administrator ad litem, and attorney ad litem for a deceased defendant, filed within 90 days of a suggestion of death and expressly citing Florida Rule of Civil Procedure 1.260(a)(1), qualifies as a timely “motion for substitution” under the rule, even if not formally titled as such. The court reversed the dismissal with prejudice, ruling that the timely motion satisfied the rule’s requirement and that the action should instead be abated pending substitution of a proper representative. The decision emphasizes substance over form, liberal construction of procedural rules to preserve claims, and that dismissal under rule 1.260(a)(1) is improper once any motion seeking substitution is timely filed.

CASE DETAILS

COURT	Florida Court of Appeals, Fourth District
WRITING FOR THE COURT	Forst, J.; May, J.; Damoorgian, J.
JURISDICTION	Florida
DOCKET	4D2022-2818
DISPOSITION	reversed
PROCEDURAL POSTURE	Appeal from a final order dismissing complaint with prejudice for failure to timely file a motion for substitution under Florida Rule of Civil Procedure 1.260(a)(1).
STANDARD OF REVIEW	de novo
PRECEDENTIAL VALUE	citable
PARTIES	David Green v. Renee Polukoff, Allstate Insurance Company

TOPICS

- civil procedure
- appellate procedure
- probate procedure
- personal injury
- motions to dismiss

PRACTICE AREAS

- Civil Procedure
- Appellate Practice
- Probate/Estates

QUESTIONS PRESENTED

1. Whether a motion to appoint a guardian ad litem, administrator ad litem, and attorney ad litem, filed within 90 days of a suggestion of death, constitutes a 'motion for substitution' under Florida Rule of Civil Procedure 1.260(a)(1).

HOLDINGS

1. A motion requesting appointment of a guardian ad litem, administrator ad litem, and attorney ad litem to represent a deceased defendant's interests, filed within 90 days of a suggestion of death, constitutes a 'motion for substitution' under Florida Rule of Civil Procedure 1.260(a)(1). The rule requires substance over form; the motion need not be titled 'motion for substitution' nor name a specific party.
2. Once a timely motion for substitution is filed, the trial court may not dismiss the action under rule 1.260(a)(1); the action should be abated pending substitution of a proper representative.

KEY QUOTATIONS

“Unless the motion for substitution is made within 90 days after a statement noting the death is filed and served on all parties as provided in Rule of General Practice and Judicial Administration 2.516, the action shall be dismissed as to the deceased party.” (at 2)

“The purpose of rule 1.260 is to facilitate the rights of persons having lawful claims against estates being preserved, so that otherwise meritorious actions will not be lost.” (at 3)

“With respect to the characterization of motions, Florida courts place substance over form.” (at 3)

“There are no specific requirements for the content of the motion, other than that it seek an order substituting a 'proper' party in place of the decedent.” (at 3)

FACTUAL BACKGROUND

Green and Defendant were involved in a car accident, and Green sued Defendant for injuries resulting from the accident. Shortly after, Defendant died, and defense counsel filed a suggestion of death, triggering rule 1.260(a)(1)'s 90-day time limit for substitution. Green was unable to open the estate over the following year.

PROCEDURAL HISTORY

Plaintiff David Green sued Defendant Renee Polukoff. After Defendant died, defense counsel filed a suggestion of death. Green filed a Motion to Appoint a guardian, administrator, and attorney ad litem within 90 days, which the trial court denied. Defense counsel moved to dismiss 91 days post-suggestion. The trial court initially denied dismissal based on excusable neglect, allowing time to substitute. After a year with no substitution because Green could not open the estate, the court granted a second motion to dismiss with prejudice. Green appealed.

DISPOSITION

reversed

REMAND INSTRUCTIONS

Reversed and remanded for further proceedings. The action should abate pending substitution of the estate or a proper legal representative.

CASES CITED

- Chemrock Corp. v. Tampa Elec. Co., 71 So.3d 786 (Fla. 2011)
- Scott v. Morris, 989 So.2d 36 (Fla. 4th DCA 2008)
- R.J. Reynolds Tobacco Co. v. Lacey, 276 So.3d 103 (Fla. 3d DCA 2019)
- Eusepi v. Magruder Eye Inst., 937 So.2d 795 (Fla. 5th DCA 2006)
- M.R. v. A.B.C., 739 So.2d 118 (Fla. 3d DCA 1999)
- Mandelko v. Lopresti, 345 So.3d 314 (Fla. 4th DCA 2022)
- IndyMac Fed. Bank FSB v. Hagan, 104 So.3d 1232 (Fla. 3d DCA 2012)
- Metcalfe v. Lee, 952 So.2d 624 (Fla. 4th DCA 2007)
- Mattick v. Lisch, 304 So.3d 32 (Fla. 2d DCA 2018)

OPINION

Green v. Polukoff, 4D2022-2818 (Fla. App. Jan 17, 2024) 1 DAVID GREEN, Appellant, v. RENEE POLUKOFF and ALLSTATE INSURANCE COMPANY, Appellees. No. 4D2022-2818 Florida Court of Appeals, Fourth District January 17, 2024 Not final until disposition of timely filed motion for rehearing. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Paige Hardy Gillman, Judge; L.T.

Case No. 502017CA009385XXXXMB. Carl A. Cascio and Gary S. Gaffney of Carl A. Cascio, P.A., Boynton Beach, for appellant. Jacqueline G. Emanuel of Knoerr & Emanuel, P.A., Fort Lauderdale, for appellees. MAY and DAMOORGIAN, JJ., concur. FORST, J. Appellant David Green appeals the trial court order dismissing his complaint with prejudice.

The trial court found that Green failed to file a motion for substitution within 90 days of the suggestion of death of defendant Renee Polukoff ("Defendant") as required under Florida Rule of Civil Procedure 1.260(a)(1).

We disagree with the trial court and reverse, holding that Green filed a timely motion requesting the trial court appoint someone to represent Defendant's interests, satisfying rule 1.260(a)(1)'s requirements. Background Green and Defendant were involved in a car accident, and Green sued Defendant for injuries resulting from the accident. A short time later, Defendant died.

Defense counsel then filed a suggestion of death, triggering rule 1.260(a)(1)'s 90-day time limit for the filing of a motion for substitution. 2 Within 90 days of the suggestion of death, Green moved to have the trial court appoint a guardian ad litem, an administrator ad litem, and an attorney ad litem ("Motion to Appoint") to represent Defendant's interests.

This motion was not titled as a motion for substitution, but it stated that "pursuant to Florida Rule of Civil Procedure 1.260," Green sought "an order appointing an Attorney ad Litem, Guardian ad Litem and Administrator ad Litem, so that the interests of the Defendant's Estate is represented during the pendency of this action and in any other action that may be filed against the Estate."

The trial court denied this motion. Ninety-one days after the suggestion of death was filed, defense counsel moved to dismiss Green's complaint. Defense counsel argued that rule 1.260(a)(1) required a motion for substitution be filed within 90 days or the trial court "shall" dismiss the case. Defense counsel contended Green's Motion to Appoint was not a motion for substitution, and the trial court was thus required to dismiss the complaint.

Four days later, Green filed an "amended motion to substitute." Green also opposed the motion to dismiss, arguing he complied with rule 1.260(a)(1)'s 90-day time limit by filing his Motion to Appoint, or alternatively, excusable neglect permitted him to file a late motion.

The trial court denied defense counsel's motion to dismiss, finding that Green had demonstrated excusable neglect. The trial court gave Green an extension of time to substitute the proper party. Green attempted to open the estate over the next year but was unable to do so. Defense counsel then filed another motion to dismiss Green's complaint on the basis that any neglect was no longer excusable.

The trial court agreed and dismissed the case with prejudice for Green v. Polukoff, 4D2022-2818 (Fla. App. Jan 17, 2024) two reasons. First, the court found that no motion for substitution had been filed within 90 days of the suggestion of death.

Second, the court found that because almost a year had passed since defense counsel's motion to dismiss was denied, any neglect was no longer excusable. This timely appeal followed. Analysis On appeal, Green primarily argues that the Motion to Appoint filed within 90 days of the suggestion of death was a "motion for substitution" under rule 1.260(a)(1), so dismissal was improper.

A procedural rule's interpretation is reviewed de novo. Chemrock Corp. v. Tampa Elec. Co., 71 So.3d 786, 790 (Fla. 2011). 3 Rule 1.260(a)(1) requires that a motion for substitution be filed within 90 days of a suggestion of death: If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.

The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be filed and served on all parties as provided in Florida Rule of General Practice and Judicial Administration 2.516 and upon persons not parties in the manner provided for the service of a summons.

Unless the motion for substitution is made within 90 days after a statement noting the death is filed and served on all parties as provided in Rule of General Practice and Judicial Administration 2.516, the action shall be dismissed as to the deceased party. Fla. R. Civ. P. 1.260(a)(1) (emphasis added). "The purpose of rule 1.260 is to facilitate the rights of persons having lawful claims against estates being preserved, so that otherwise meritorious actions will not be lost."

Scott v. Morris, 989 So.2d 36, 37 (Fla. 4th DCA 2008) (internal citation omitted). The rule is designed to protect "plaintiffs asserting claims against a decedent, and the decedent's heirs, not defendants." R.J. Reynolds Tobacco Co. v. Lacey, 276 So.3d 103, 107 (Fla. 3d DCA 2019); see also Eusepi v. Magruder Eye Inst., 937 So.2d 795, 798 (Fla. 5th DCA 2006) ("The rule is supposed to dispel rigidity, create flexibility and be given liberal effect.").

In Scott, we interpreted the meaning of "motion for substitution" in rule 1.260(a)(1) broadly. There, the plaintiff filed a "Motion to substitute party or parties" within 90 days of the defendant's suggestion of death. 989 So.2d at 37.

The motion did not request any specific party be substituted for the defendant. *Id.* Instead, the motion requested that defense counsel provide the information necessary to open the estate and that the trial court order the defendant to provide that information. *Id.* We held that this filing was a "motion for substitution" under rule 1.260(a)(1), and its filing within 90 days meant the trial court could no longer dismiss the case based on noncompliance with the 90-day requirement.

Id. Applying Scott, we conclude that Green's "Motion to Appoint" was a "motion for substitution" under rule 1.260(a)(1). Green's motion requested the trial court appoint someone to represent the interests of the deceased defendant, which is all that Scott and rule 1.260(a)(1) require. See *M.R. v. A.B.C.*, 739 So.2d 118, 119 (Fla. 3d DCA 1999) ("There are no specific 4 Green v. Polukoff, 4D2022-2818 (Fla.

App. Jan 17, 2024) requirements for the content of the motion, other than that it seek an order substituting a 'proper' party in place of the decedent." (citation and quotation marks omitted)). Green was not required to label his motion as a "motion for substitution," when his Motion to Appoint was a clear attempt to comply with rule 1.260(a)(1), evidenced by its explicit citation to rule 1.260(a)(1).

See *Mandelko v. Lopresti*, 345 So.3d 314, 317 (Fla. 4th DCA 2022) ("With respect to the characterization of motions, Florida courts place substance over form." (quoting *IndyMac Fed. Bank FSB v. Hagan*, 104 So.3d 1232, 1236 (Fla. 3d DCA 2012))); *Metcalf v. Lee*, 952 So.2d 624, 629 n.2 (Fla. 4th DCA 2007) (explaining that where the plaintiff attempts to substitute an improper party, the trial court should deny the motion, but the timely filing of the denied motion nevertheless makes dismissal pursuant to rule 1.260(a)(1) no longer the appropriate remedy).

Because Green timely filed a motion for substitution, the trial court could not dismiss the case under rule 1.260(a)(1). See *Mattick v. Lisch*, 304 So.3d 32, 33 (Fla. 2d DCA 2018) ("[T]he motion to substitute was filed within ninety days of the suggestion of death.

Thus, rule 1.260(a)(1) did not provide a basis for dismissal."). [1] The formal appointment of a personal representative is not a precondition to filing a motion to substitute. See *Metcalfe*, 952 So.2d at 629-30; *Eusepi*, 937 So.2d at 798; *M.R.*, 739 So.2d at 119. Since Green filed a timely motion for substitution, "[t]he action should have been abated until the estate or a proper legal representative had been substituted."

Mattick, 304 So.3d at 33. We further determine that, although the trial court "had the authority [under Florida Rule of Civil Procedure 1.420(b)] to dismiss the complaint as a sanction for dilatory conduct... the record does not support a finding that [Green's] failure to open the estate was willful or deliberate." *Id.* Conclusion Green timely moved for the trial court to appoint a guardian ad litem, an administrator ad litem, and an attorney ad litem, citing rule 1.260(a)(1) in support.

Because Green's motion was filed within 90 days of Defendant's suggestion of death, the trial court could not dismiss Green's complaint with prejudice under rule 1.260(a)(1). Accordingly, we reverse the trial court's order dismissing Green's complaint with prejudice. Reversed and remanded for further proceedings. Notes: [1] As we hold Rule 1.260(a)(1)'s 90-day requirement was not violated, we need not address whether Green's failure to open an estate within a year constituted "excusable neglect" under Florida Rules of Civil Procedure 1.090(b)(1)(B) or 1.540(b).