DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

Keeter v. Bank of New York Mellon

194 So. 3d 469 (Fla. Dist. Ct. App. 2016) · Decided May 25, 2016

SUMMARY

The court affirmed a foreclosure judgment because the appellant's arguments were not properly preserved, while stating that the affirmance was without prejudice to seeking relief under Florida Rule of Civil Procedure 1.540(b). The court also noted that the clerk improperly entered a default after the appellant had filed a motion and that the appellant lacked proper notice concerning unliquidated attorney's fees.

CASE DETAILS

COURT	District Court of Appeal of Florida, First District
WRITING FOR THE COURT	Thomas, J.; Winokur, J.; Jay, J.
JURISDICTION	Florida
DECIDED	May 25, 2016
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a final judgment of foreclosure.
PRECEDENTIAL VALUE	Published and precedential
PARTIES	Judy Ann Jean Keeter v. Bank of New York Mellon

TOPICS

foreclosure · default · preservation of error · appellate procedure · attorney fees

PRACTICE AREAS

foreclosure · civil procedure · appellate procedure · remedies

QUESTIONS PRESENTED

1. Whether the appeal should result in reversal when the asserted errors were not properly preserved.
2. Whether the clerk could properly enter a default after the defendant had filed a motion in the action.
3. Whether the defendant was entitled to notice of the hearing on unliquidated attorney's fees under Florida Rule of Civil Procedure 1.440(c).

4. Whether relief from the foreclosure judgment could be sought under Florida Rule of Civil Procedure 1.540(b).

HOLDINGS

1. The foreclosure judgment was affirmed because the grounds raised on appeal were not properly preserved.
2. A clerk may not properly enter a default against a party who has already filed a motion in the action; the default and resulting judgment may be subject to being set aside upon proper application.
3. A defaulting party is entitled to notice of the hearing on unliquidated attorney's fees, and a judgment awarding such damages without the required notice may be void as to those damages.
4. The affirmance was without prejudice to Keeter filing a motion in the trial court seeking relief from the foreclosure judgment under Florida Rule of Civil Procedure 1.540(b).

KEY QUOTATIONS

> *"Although we affirm due to the lack of proper preservation, our affirmance is without prejudice to appellant filing in the trial court a motion seeking relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(b)."* (194 So. 3d at 469)

> *"Appellant correctly notes that the clerk could not enter a default against her when she had filed a motion the previous day."* (194 So. 3d at 469)

> *"In addition, appellant did not receive proper notice of hearing pursuant to Florida Rule of Civil Procedure 1.440(c) where unliquidated damages in the form of attorney's fees were awarded to appellee."* (194 So. 3d at 469)

FACTUAL BACKGROUND

The appeal arose from a foreclosure judgment that included an award of unliquidated attorney's fees. Keeter had filed a motion before the clerk entered a default against her. She also did not receive notice of the hearing required for the award of unliquidated damages in the form of attorney's fees.

PROCEDURAL HISTORY

Keeter appealed a final foreclosure judgment, raising several grounds for reversal. The First District affirmed because the asserted errors were not properly preserved, while stating that the affirmance was without prejudice to Keeter seeking relief from the judgment under Florida Rule of Civil Procedure 1.540(b).

DISPOSITION

affirmed

REMAND INSTRUCTIONS

No remand was ordered. The affirmance was without prejudice to Keeter filing a motion in the trial court under Florida Rule of Civil Procedure 1.540(b).

CASES CITED

- Torres v. One Stop Maint. & Mgmt., Inc., 178 So. 3d 86 (Fla. 4th DCA 2015)
- Stephens v. Bank of N.Y., 765 So. 2d 294 (Fla. 1st DCA 2000)
- Turner v. Allen, 389 So. 2d 686 (Fla. 5th DCA 1980)
- Straughn v. G.J.M., Inc., 372 So. 2d 1163 (Fla. 1st DCA 1979)
- Stuart-Findlay v. Bank of Am., N.A., 183 So. 3d 468, 471 (Fla. 4th DCA 2016)
- Ciprian-Escapa v. City of Orlando, 172 So. 3d 485, 488 (Fla. 5th DCA 2015)
- Asian Imports, Inc. v. Pepe, 633 So. 2d 551, 553 (Fla. 1st DCA 1994)

OPINION

PER CURIAM.

PER CURIAM. In this appeal from a final judgment of foreclosure, appellant seeks reversal of the judgment on a number of grounds. Although we affirm due to the lack of proper preservation,' our affirmance is without prejudice to appellant filing in the trial court a motion seeking relief from judgment pursuant, to Florida Rule of Civil Procedure 1.540(b). See Torres v. One Stop Maint. & Mgmt., Inc., 178 So.3d 86 (Fla.

4th DCA 2015); Stephens v. Bank of N.Y., 765 So.2d 294 (Fla. 1st DCA 2000); Turner v. Allen, 389 So.2d 686 (Fla. 5th DCA 1980); Straughn v. G.J.M., Inc., 372 So.2d 1163 (Fla. 1st DCA 1979). Appellant correctly notes that the clerk could not enter ’a default against her when she had filed a motion the previous day. See Stuart-Findlay v. Bank of Am., N. A., 183 So.3d 468, 471 (Fla.

4th DCA 2016) (holding that when a party has served any paper in the action, a default entered by the clerk.is erroneous and upon proper application by such party, the default and final judgmént consequent thereon should be set aside).

In addition, appellant did not receive proper notice of hearing.pursuant to Florida Rule of Civil Procedure 1.440(c) where unliquidated damages in the form of attorney’s fees were awarded to appellee. See Ciprian-Escapa v. City of Orlando, 172 So.3d 485, 488 (Fla. 5th DCA 2015) (holding that a judgment rendered without a trial and without notice to the defaulting party is void as to any unliqui-dated damages and may b¿ collaterally attacked at any time); Asian Imports, Inc. v. Pepe, 633 So.2d 551, 553 (Fla.

1st DCA 1994) (holding that the defaulting mortgagor was entitled to a notice of hearing on the issue of attorney’s fees). AFFIRMED. THOMAS, WINOKUR, and JAY, JJ., concur.