

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY  
APPELLATE DIVISION

LUIS A. VALENTIN,  
Appellant,

UCN: 512017AP000032APAXWS

Appeal No.: 2017-AP-32

v.

Lower No.: 2017-CC-973

ROLAND D. WALLER, AS TRUSTEE  
OF THE CLIFFORD L. PRUITT  
TESTAMENTARY TRUST DATED  
JULY 21, 2003,  
Appellee.

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On appeal from Pasco County Court,  
Honorable Anne Wansboro

Luis A. Valentin, *pro se*  
for Appellant,

Roland D. Waller, Esq.  
for Appellee.

**ORDER AND OPINION; ORDER DENYING APPELLEE'S MOTION TO DISMISS**

THIS MATTER comes before the Court *sua sponte* pursuant to Florida Rule of Appellate Procedure 9.315(a) ("After service of the initial brief in appeals under rule 9.110, 9.130, or 9.140 . . . the court may summarily affirm the order to be reviewed if the court finds that no preliminary basis for reversal has been demonstrated").

Because Appellant's motion to vacate was filed in the trial court pursuant to Florida Rule of Civil Procedure 1.540(b)(5), this Court must summarily affirm the trial court's order denying the motion for the reasons detailed below in this opinion. Because this Order and Opinion affirms the trial court's order and disposes of the appeal, Appellee's Motion to Dismiss is moot.

**STATEMENT OF THE CASE AND FACTS**

On March 21, 2017, Appellee filed a mortgage foreclosure action against Appellant. Included with the pleading were a copy of the mortgage note and a document

transferring the mortgage note from the decedent mortgagor, Clifford Pruitt, to Appellee as trustee of the decedent's trust. On March 24, 2017, a summons was issued to Appellant. The summons stated, in Spanish, that a lawsuit had been filed against him and that he had 20 calendar days to file a written response. The summons further stated that failure to respond might result in losing the case as well as property being taken away from him. Appellant did not file a written response to the complaint.

On April 21, 2017, Appellee filed with the Clerk of the Court a Motion for Default Judgment for Appellant's failure to file a response, serve any paper on Appellee, or file any paper in the case. A copy of the motion was mailed to Appellant. On April 25, 2017, the Clerk entered a Default Judgment. On May 2, 2017, Appellee filed a Motion for Summary Judgment. A copy of the motion was mailed to Appellant. On May 3, 2017, Appellee filed the original mortgage note which reflects that the mortgage was entered into on March 24, 2000 between Appellant and the testator of the trust of which Appellee is a trustee. The mortgage note reflects that payments on the mortgage began on April 1, 2000. On May 9, 2017, Appellant was mailed a notice of the hearing on the Motion for Summary Judgment. Appellant did not appear at the hearing. On May 19, 2017, the trial court granted the motion and entered a Uniform Final Judgment of Foreclosure. In the final judgment, a public sale of the property in question was set for June 26, 2017. A copy of the final judgment was mailed to Appellant.

Only after receiving a notice of eviction from the foreclosed property did Appellant finally take action. On July 19, 2017, Appellant filed an emergency "Motion to Vacate Certificate of Title; Final Judgment; and Motion to Vacate Default with Incorporated Memorandum of Law" (Motion to Vacate). In the motion, Appellant sought to vacate the default and final judgments pursuant to Florida Rule of Civil Procedure 1.540(b)(5). The motion asserted that an amortization schedule from 2000 used by Appellee was incorrect, that Appellant possessed the original amortization schedule from 1996, and that the 1996 amortization schedule established that mortgage payments began in 1996 and that the mortgage had been paid in full. The motion further asserted that Appellant speaks Spanish and was not fully aware of what was going on at the time. The motion argued that because the mortgage had been paid in full prior to the filing of the complaint, enforcing the default and final judgments against Appellant would produce an inequitable

and unjust result as contemplated by rule 1.540(b)(5). Appellant attached an Appendix to the motion purporting to show the 1996 amortization schedule and full repayment of the mortgage on March 15, 2016.

A hearing was held on the motion on August 7, 2017. On August 14, 2017, the trial court issued an order denying the motion. On September 5, 2017, Appellant timely-filed a Notice of Appeal of the order denying the Motion to Vacate.<sup>1</sup> On November 9, 2017, pursuant to this Court's order, Appellant filed his Second Amended Notice of Appeal and attached a conformed copy of the trial court's order denying his motion to vacate.

### **STANDARD OF REVIEW**

The standard of review for an order denying a motion to vacate pursuant to Florida Rule of Civil Procedure 1.540(b)(5) is whether the trial court abused its discretion. *Stoppa v. Sussco, Inc.*, 943 So. 2d 309, 310 (Fla. 3d DCA 2006).

### **LAW AND ANALYSIS**

In his Second Amended Initial Brief, Appellant asserts, as he did below in his Motion to Vacate, that he paid the mortgage in full on March 15, 2016. Appellant argues that the trial court had this information and thus erred when it denied his Motion to Vacate. Appellant attached to his Second Amended Initial Brief the same 1996 amortization schedule he attached to his Rule 1.540(b)(5) motion below.<sup>2</sup>

Appellant has not provided a transcript of the motion hearing. Thus, the Court cannot determine on what basis the trial court denied the motion. However, this Court affirms the trial court's order because, regardless of the trial court's reasoning, case law interpreting and applying Florida Rule of Civil Procedure 1.540(b)(5) establishes that Appellant's Motion to Vacate pursuant to that rule could not have been properly granted under the facts alleged in the motion and his Second Amended Initial Brief.

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<sup>1</sup> Because Appellant did not file his initial Notice of Appeal until September 5, 2017, this Court cannot review the trial court's May 19, 2017 final judgment of foreclosure, only the August 14, 2017 order denying Appellant's motion to vacate. See Fla. R. App. P. 9.110(b) (providing that a notice of appeal must be filed within 30 days of the rendition date of the order to be reviewed).

<sup>2</sup> Appellant attached other documents in addition to the amortization schedule, but this Court cannot consider or address them because they are not part of the trial court record. See *Izquierdo v. J. Humphrey Mgmt. LLC*, 35 So. 3d 946, 947 (Fla. 3d DCA 2010) (holding that documents presented for the first time to the appellate court could not be considered because they were not before the lower tribunal and not in the record on appeal).

The rule under which Appellant brought his Motion to Vacate provides in relevant part:

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: (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.

Fla. R. Civ. P. 1.540(b)(5).

Rule 1.540(b)(5) is narrowly construed and is designed to provide extraordinary relief in exceptional circumstances. *Pure H2O Biotechnologies, Inc. v. Mazziotti*, 937 So. 2d 242, 245 (Fla. 4th DCA 2006). Only circumstances that arise after the final judgment is entered may be addressed under rule 1.540(b)(5). *Id.* If a party had a chance to litigate the issue or present a defense below and did not do so, then the final judgment should not be vacated pursuant to rule 1.540(b)(5) because the circumstances clearly arose before the judgment's entry. *Id.* See also *Schindler v. Schiavo (In re Shiavo)*, 792 So. 2d 551, 559 (Fla. 2d DCA 2001) ("[Rule 1.540(b)(5)] requires the movant to establish that significant *new evidence* or substantial changes in circumstances arising after the entry of the judgment make it "no longer equitable" for the trial court to enforce its earlier order"). (Emphases added.)

In the case below, a default judgment was entered against Appellant because he failed to respond to Appellee's complaint. A final judgment of foreclosure was subsequently entered. Appellant's Motion to Vacate stated that he had paid the mortgage in full just over a year prior to Appellee filing his complaint. Thus, the circumstances supporting the motion arose prior to the entry of the final judgment, but Appellant failed to litigate the issue by failing to respond to the complaint. Therefore, Rule 1.540(b)(5) relief could not properly have been granted by the trial court and the trial court's order denying that motion must be affirmed.

#### **APPELLEE'S MOTION TO DISMISS APPEAL**

Because this Order and Opinion disposes of the appeal, Appellee's motion to dismiss the appeal filed on April 4, 2018 is denied as moot.

It is therefore **ORDERED AND ADJUDGED** that the trial court's judgment is hereby summarily **AFFIRMED**.

It is **FURTHER ORDERED** that Appellee's motion to dismiss appeal is hereby **DENIED**.

**DONE AND ORDERED** in Chambers at New Port Richey, Pasco County, Florida this \_\_\_\_ day of \_\_\_\_\_, 2018.

Original Order entered on May 16, 2018, by Circuit Judges Susan G. Barthle, Kimberly Campbell, and Shawn Crane.

*Copies furnished to:*  
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