

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

**NEIL J. MORAN,
Appellant,**

**REF: 18-000061AP-88A
UCN: 522018AP000061XXXXCI**

-vs-

**CITY OF LARGO, CITY OF LARGO
CODE ENFORCEMENT BOARD'
CITY OF LARGO CODE OFFICER,
Appellee.**

**ORDER DENYING APPELLANT'S MOTION FOR ORDER TO RE-ISSUE
THE FINAL ORDER AND RECALL THE MANDATE**

THIS MATTER is before the Court on the "Appellant's Motion for Order to Re-Issue the Final Order and Recall" the Mandate filed March 23, 2020. Upon review of Appellant's Motion, Appellee's Response, the court file and applicable law, this Court finds as follows:

This Court issued a written opinion, per curiam, affirming the Findings of Fact, Conclusion of Law and Order, Notice of Hearing and Affidavit of Non-Compliance and Action of Affidavit of Non-Compliance and Second Order rendered by the City of Largo Code Enforcement Board November 6, 2019. The Clerk of Court issued the Mandate November 22, 2019. The documents were served by U. S. Mail to Appellant at his residence, 1117 Beverly Avenue, Largo, FL 33770.

Appellant states that he did not receive either the Court's opinion or the Mandate issued by the Clerk of Court. Appellee states he received both the Court's opinion and the Mandate issued by the Clerk of Court. Appellee cites to prior orders of this Court received by Appellant at the above address, such as Appellant's response to Appellee's motion for extension of time as well as a reply brief responding to Appellee's answer brief.

Appellant argues that under Fla. R. Civ. Pro. 1.540(b) a trial court is able to vacate a final order due to mistake, inadvertence, surprise or excusable neglect. Woldarsky v. Woldarsky, 243 So. 2d 629 (Fla. 1st DCA 1971). Appellant also argues that “as a preliminary matter, where a litigant does not receive a final order until after the appeal time has run, the litigant is entitled to have the order re-entered so as to allow a filing of a timely motion for rehearing or a notice of appeal.” Kanecke v. Lennar Homes, Inc., 543 So. 2d 784 (Fla. 3rd DCA 1989). Appellant’s arguments are without merit as the above cited cases involve trial court proceedings governed by the Florida Rules of Civil Procedure.

Florida Rules of Civil Procedure cannot be utilized in appellate proceedings seeking review of quasi-judicial actions by a lower tribunal. “Because the trial court proceeding sought review of quasi-judicial action by a lower tribunal, it was governed by the Florida Rules of Appellate Procedure. Accordingly, Florida Rule of Civil Procedure 1.540(b) was unavailable to appellant.” Hampton v. McDonough, 967 So. 2d 317, 317 (Fla. 1st DCA 2007); Hoffman v. McDonough, 969 S. 2d 514, 515 (Fla. 1st DCA 2007)

Florida Rules of Appellate Procedure 9.010 provides that “These rules shall supersede all conflicting statutes and, as provided in Florida Rule of Judicial Administration 2.130, all conflicting rules of procedure. The Florida Supreme Court has recognized that appellate proceedings “are not governed by the rules of civil procedure, rather, they are governed by the rules of appellate procedure. The civil rules and the appellate rules address procedures that are specific to those respective proceedings.” Advanced Chiropractic & Rehab. Ctr., Corp. v. United Auto. Ins. Co., 140 So.3d 529 (Fla. 2014).

Appellant seeks to have the Court recall the mandate and re-issue the opinion to allow Appellant the ability to file for second tier certiorari review with the Second District Court of Appeals. Under Florida Rule of Appellate Procedure 9.100(c)(1), the thirty day time limit to file a petition for writ of certiorari following the rendition of the order to be reviewed is jurisdictional. Pitzer v. Bretey, 95 So. 3d 1005, 1006 (Fla. 2d DCA 2012). An untimely appeal cannot be revived by obtaining a new order to the same effect as the original and then filing the notice of appeal within thirty days of the more recent order. Caldwell v. Wal-Mart Stores, Inc., 980 So. 2d 1226, 1229 (Fla 1st DCA 2008). See Gen. Motors Corp. v. Strickland, 913 So.2d 1227 (Fla. 1st DCA 2005).

Appellant contends his statement that he did not receive the November 6, 2019 opinion or the November 22, 2019 mandate is undisputed as he attached affidavits in support of his motion. Florida Rule of Appellate Procedure 9.420(b)(2) and (3) and Florida Rule of Judicial Administration Rule 2.516(b)(2) provide that “service on and by all parties who are not represented by an attorney and who do not designate an e-mail address . . . must be made by delivering a copy of the document or by mailing it to the party . . . at their last known address . . . Service by mail is complete upon mailing.” See Jones v. State, 239 So. 3d 1222 (Fla. 2d DCA 2017). The Florida Supreme Court has held that the courts’ clerks are presumed to have fulfilled their statutory duties to serve documents upon parties. Wells v. Thomas, 78 So. 2d 379, 384 (Fla. 1954). A certificate of service is prima facie evidence that an order was mailed, which raises the presumption that the order was received. This presumption is not overcome by a sworn denial that the mail was not received. See Scott v. Johnson, 386 So. 2d 67, 69 (Fla. 3d DCA 1980).

In the case at bar, Appellant did not designate an email address. Accordingly, the opinion and mandate were mailed to the address listed with the Clerk of Court and at which Appellant resides and had been used for service of all prior documents. Appellant's affidavits are insufficient to overcome the presumption that this Court and the Clerk of Court fulfilled their duties.

Accordingly, it is

ORDERED AND ADJUDGED that Appellant's Motion for Order to Re-Issue the Final Order and Recall" the Mandate filed March 23, 2020 is DENIED.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida this 14th day of May, 2020.

TRUE COPY

Original Order entered on May 14, 2020, by Circuit Judges Jack R. St Arnold, Patricia Muscarella, and Keith Meyer.

Copies furnished to:

NEIL J. MORAN
1117 BEVERLY AVENUE
LARGO, FL 33770

ALAN S. ZIMMET, B.C.S.
ISABELLA E. SOBEL, ESQ.
BRYANT MILLER OLIVE, P.A.
ONE TAMPA CITY CENTER, STE.
2700 TAMPA, FL 33602