Third District Court of Appeal

State of Florida

Opinion filed April 22, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D19-1395 & 3D19-518
Lower Tribunal No. 18-23308

Julio Avael,
Appellant,

vs.

Sarina Sechrist, et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Abby Cynamon, Judge.

Pollack, Pollack & Kogan, LLC, and Lyudmila Kogan and Maria Kimijima, for appellant.

Vargas Gonzalez Hevia Baldwin, LLP, and Omari S. Ruddock and Matthew L. Baldwin, for appellees.

Before SALTER, LOGUE and GORDO, JJ.

SALTER, J.

Julio Avael appeals final orders denying his pro se motion to vacate a final judgment enforcing a settlement agreement and a related contempt order (consolidated case number 3D19-518),[1] and a later and more detailed motion to vacate that final judgment filed after he retained counsel (case number 3D19-1395). For the reasons which follow, we affirm.

Mr. Avael was a principal in a company called Motivational Coaches of America, Inc., doing business as MCUSA, Inc. ("MCUSA"). MCUSA entered into "Service Membership Offer Agreements" with the six individual employees ("Employees") who are the plaintiffs below and the appellees here. Mr. Avael was not a party to those agreements (the "Contracts").

In June 2018, the Employees claimed that MCUSA had not paid them amounts due under the Contracts. The Employees retained counsel, who sent a demand letter to MCUSA, its registered agent, and Mr. Avael, addressed to all of them at MCUSA's offices. The demand letter alleged that "you" materially breached the Contracts and that "you" committed civil theft under section 772.11, Florida Statutes (2018).

The following month, the Employees filed a circuit court lawsuit against both Mr. Avael and MCUSA. In Count I, the Employees alleged that MCUSA breached

[1] The briefs filed by the parties indicate that the issues regarding the contempt order in Case No. 3D19-518 have been resolved and are moot.

the Contracts and that Mr. Avael, an agent of MCUSA, breached his supplemental oral agreements to assure payment of the amounts due. In Count II, the Employees alleged civil theft by Mr. Avael and MCUSA, accusing both of embezzlement or conversion of funds due to the Employees. The complaint attached copies of the prior demand letter and the Contracts.

In August 2018, MCUSA, Mr. Avael, and the Employees entered into a four page "Settlement Agreement and Mutual General Release," which each of them signed (the "Settlement Agreement").[2] The Settlement Agreement refers to "the court case related to this litigation" and "a final order dismissing the lawsuit with prejudice," upon full payment of the amounts specified to be paid to the Employees, but the docket does not reflect any service of the complaint on MCUSA or Mr. Avael. The Settlement Agreement does not identify the lawsuit by style or case number. The record also fails to establish whether MCUSA or Mr. Avael received a copy of the lawsuit before collection proceedings commenced on the subsequent final judgment.

The Settlement Agreement includes a paragraph whereby all the parties "consent to jurisdiction in the Miami-Dade Circuit Court for the enforcement of [the

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[2] As the appellants never presented evidence, an affidavit, or argument of counsel to the contrary, the authenticity of the signatures on the Settlement Agreement ultimately filed with the trial court are undisputed on this record.

Settlement Agreement] absent further effort and hereby waive actual service of process by or upon either party."

About a week after the parties exchanged the signature pages to the Settlement Agreement, the Employees filed a motion in the trial court to enforce the Settlement Agreement, alleging non-payment of amounts due. The motion did not attach a copy of the Settlement Agreement. More significantly, the certificate of service stated that it was "served via an automated email generated by the Florida Courts E-Filing Portal this [date] to all attorneys who have elected to receive service." Mr. Avael and MCUSA[3] had not appeared by counsel in the lawsuit, and there is no indication that either of them designated any e-mail address for service. See Fla. R. Jud. Admin. 2.516(b)(1)(C) ("Any party not represented by an attorney may serve a designation of a primary e-mail address . . . . If a party not represented by an attorney does not designate an e-mail address . . . , service on and by that party must be by the means provided in subdivision (b)(2)."). Nor is there any indication in the record that either of them was served by personal delivery or by mail (which would be duly noted in the certificate of service). Id., 2.516(b)(2) (mandating that service on a pro

[3] MCUSA could not appear except through counsel. Szteinbaum v. Kaes Inversiones y Valores, C.A., 476 So. 2d 247, 248 (Fla. 3d DCA 1985) ("It is well recognized that a corporation, unlike a natural person, cannot represent itself and cannot appear in a court of law without an attorney.").

se party who does not designate an e-mail address must deliver or mail to the party's last known address or, if not known, note non-service in the certificate of service).

The motion to enforce the Settlement Agreement was noticed for a five-minute motion calendar hearing, but that hearing was cancelled. A week later the Employees filed a "Motion for Entry of Final Judgment," which attached a copy of the signed Settlement Agreement and a proposed form of final judgment. The certificate of service of the motion was in the same apparently deficient form as the earlier motion to enforce the Settlement Agreement. The Motion for Entry of Final Judgment and the proposed form of final judgment attached to it (which was the form ultimately entered by the trial court and sought to be vacated by the appellants) also included a non-party's claim for unpaid amounts.[4]

The Motion for Entry of Final Judgment was noticed and heard at a five-minute motion calendar hearing in October 2018. MCUSA and Mr. Avael made no appearance. The final judgment was entered the same day.

In early 2019, Mr. Avael apparently became aware of the Employees' efforts to obtain financial discovery and to collect the final judgment. He filed a pro se, unverified motion to vacate the final judgment pursuant to Florida Rule of Civil Procedure 1.540(b) alleging that he only became aware of the Employees' motions

[4] This former employee, whom we will designate by her initials as "Ms. M.J.," was a party to the Settlement Agreement but not a plaintiff with the Employees in the lawsuit, and is not a party to this appeal.

and final judgment in February 2019, and that he had never been served with initial process. That motion was heard and denied without elaboration. Mr. Avael appealed—the first of the two consolidated cases before us (Case number 3D19-518). There is no transcript of the hearing in the record, nor is there any approved statement of the evidence or proceedings relating to that hearing prepared and furnished pursuant to Florida Rule of Appellate Procedure 9.200(b)(5). We affirm that order without further discussion. See G & S Dev. Corp. v. Seitlin, 47 So. 3d 893, 895 (Fla. 3d DCA 2010) ("Without a record of the hearing, this Court cannot determine what issues were raised or argued by the parties during the hearing, and therefore, may reverse the decision only if an error of law appears on the face of the order under review." (internal quotations omitted)).

After the Employees served a writ of bodily attachment addressing Mr. Avael's failure to produce financial information, Mr. Avael retained counsel. His attorney then filed a more detailed motion under Florida Rule of Civil Procedure 1.540(b)(3) and (4) to vacate the final judgment. The motion was not verified. It argued that Mr. Avael was never served, and that he had not become aware of the motion for entry of final judgment or the actual entry of that judgment until four months later. The motion contended that relief from the final judgment was appropriate because of misrepresentations of the Employees' counsel regarding service (Rule 1.540(b)(3)) and because the judgment was void (Rule 1.540(b)(4)).

That motion was argued by the attorneys for the parties to the trial court for fifty minutes. No evidence was offered or admitted. The trial court denied the motion in an unelaborated order, and Mr. Avael's second appeal followed (Case number 3D19-1395).

Analysis

Our standard of review for an order denying a motion to vacate under Rule 1.540(b) ordinarily is for an abuse of discretion; we are obligated to reverse, however, only if the challenged judgment is void, rather than voidable. Lamoise Grp., LLC v. Edgewater South Beach Condo. Ass'n, 278 So. 3d 796, 798 (Fla. 3d DCA 2019) ("[I]f a judgment previously entered is void, the trial court must vacate the judgment.").

Statutes governing service of process are strictly construed, and the burden is on a plaintiff to establish that a defendant has been validly served and provided notice of the proceedings. Anthony v. Gary J. Rotella & Assocs., P.A., 906 So. 2d 1205, 1207 (Fla. 4th DCA 2005). Service of process may be waived in three ways: (1) when the defendant voluntarily serves responsive pleadings, motions, or papers; (2) when a defending party authorizes the party's attorney to accept the initial pleadings without service of process; and (3) when a defending party agrees to accept service of process by mail. Id. at 1208; see also A.T. Clayton & Co. v. Hachenberger, 2011 WL 1899256 at *5 (M.D. Fla. 2011) ("The three ways in which

a defendant may waive his right to be personally served is through an intentional waiver; an attempt to evade service; or by granting someone authority to accept process for him.”).

In the present case, we are reminded of Benjamin Franklin’s adage, “an ounce of prevention is worth a pound of cure.” When finally retained, Mr. Avael’s attorneys worked diligently to protect his interests. But Mr. Avael’s arguments fail because of the actions that preceded his retention of counsel. First, Mr. Avael signed a settlement agreement which did not have attached to it the lawsuit purportedly being settled. Second, he did so without (so far as the record discloses) consulting counsel to advise him.[5] Paragraph 3 of the Settlement Agreement included Mr. Avael’s consent to jurisdiction in the circuit court for enforcement, and in that provision he also waived “actual service of process by or upon either party.”

Third, Mr. Avael commenced his effort to climb out of this ditch by representing himself. His initial pleading in the case, his pro se motion to vacate, was unverified, and he proffered nothing to explain why his written waiver of service in the Settlement Agreement should be disregarded. He provided no transcript and no evidence regarding his first (pro se) motion to vacate, and he provided no

[5] Paragraph 15 of the Settlement Agreement stated that the parties “acknowledge or waive the assistance of counsel in reading, understanding, and executing [the Settlement Agreement],” and thereby “forever surrendering certain rights as reflected herein.”

testimony or affidavit to demonstrate why his attorney's subsequent motion to vacate should be granted. On such a record, we cannot conclude that the trial court abused its discretion.

Mr. Avael has also argued for reversal based on the alleged unenforceability of a late payment amount set forth in Paragraph 6 of the Settlement Agreement. The Settlement Agreement characterizes the fees as "liquidated damages," and Mr. Avael argues that they are instead an unenforceable penalty amount. Mr. Avael's argument fails because it was a negotiated term in a settlement which compromised, among other things, the Employees' claims for civil theft and treble damages against MCUSA and Mr. Avael. Moreover, because Mr. Avael failed to appear and defend himself in the lawsuit, his presentation of the argument as part of a motion to vacate the final judgment enforcing the Settlement Agreement came too late. The trial court reviewed the late payment provision and concluded that it did not, on its face, constitute an unenforceable penalty provision. No appeal followed, apparently because Mr. Avael had not followed developments in the lawsuit (albeit obliquely referenced) in the Settlement Agreement he signed. Mr. Avael certainly knew that he had not made the payments specified to be made, and he had consented in writing to "garnishment and related subpoenas," "waiving any and all objections" if the Employees were compelled to secure payment.

Conclusion

This opinion simply underscores the importance of (a) raising objections to service or to the terms of settlement agreements, sooner rather than later, and (b) consulting an attorney before waiving important legal rights or filing a motion as procedurally and substantively difficult as a motion to vacate a final judgment.[6]

Affirmed.

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[6] Because of the procedural irregularities pertaining uniquely to the status of the non-party, purported judgment creditor Ms. M.J. (see supra note 4), we express no opinion regarding the enforceability of the final judgment as to the Settlement Agreement indebtedness ascribed to her. None of the parties to the circuit court lawsuit or to these appeals has addressed any such rights, and thus we decline to do so as well.