

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

WACHOVIA MORTGAGE, FSB
f/k/a WORLD SAVINGS BANK,

Plaintiff,

Case No. 52-2008-CA-017220

v.

JULIANNA ZAKRZEWSKA, *et. al.*

Defendants,

EMERGENCY, VERIFIED MOTION TO VACATE FINAL JUDGMENT

Defendant, JULIANNA ZAKRZEWSKA, by and through her undersigned counsel and pursuant to Fla.R.Civ.P. 1.540, moves this Court for entry of an Order vacating the Final Judgment of Foreclosure entered against her and cancelling the foreclosure sale scheduled for November 18, 2011, and would show:

OVERVIEW

1. Everyone involved in this case (Plaintiff, Plaintiff's counsel, and Defendant's former counsel) knows that Defendant resides in Great Britain. Defendant's address in Great Britain is set forth on the Note attached to the Complaint, and Defendant was personally served with the Summons and Complaint in Great Britain. Nonetheless, when Defendant's former counsel withdrew, Defendant was given no notice of the withdrawal or the proceedings that transpired thereafter, including the hearing on Defendant's Motion for Summary Judgment. As a result, the Final Judgment of Foreclosure was entered without notice to Defendant.

2. A foreclosure sale is scheduled for November 18, 2011. Given the lack of notice, and the controlling Florida cases which require the Final Judgment be vacated, this Court should proceed on an emergency basis, cancel the foreclosure sale, and vacate the Final Judgment.

3. At minimum, the November 18 foreclosure sale should be cancelled until this motion can be fully and fairly adjudicated.

ARGUMENT

4. When Plaintiff initially tried to effectuate service of the Summons and Complaint upon Defendant, it asserted Defendant's whereabouts were unknown and tried to resort to service by publication. However, the Note attached to the Complaint reflects Defendant's residence is in Great Britain, and Plaintiff had not served her there. As a result, Defendant filed a Motion to Quash Service of Process. See Exhibit "A" hereto.

5. Acknowledging Defendant resided in Great Britain, Plaintiff effectuated personal service on Defendant at her address in Great Britain, where she has resided since the inception of this case. See Exhibit "B" hereto.

6. Thereafter, Defendant's former counsel, Denis A. Cohrs, Esq., filed a Motion for Leave to Withdraw and a Notice of Hearing, setting said motion for hearing on December 3, 2010.

7. Defendant was not identified in the Certificate of Service on the Motion for Leave to Withdraw. See Exhibit "C" hereto.

8. Although Defendant was identified on the Certificate of Service for the Notice of Hearing, said document reflects it was mailed to Defendant "c/o Dan Pearson, 970 Boca Ciega Isle Drive, St. Pete Beach, FL 33706." Likewise, in its Order Granting Motion to Withdraw, this Court directed that service on Defendant shall be mailed to "Julianna Zakrzewska, c/o Dan Pearson, 970 Boca Ciega Isle Drive, St. Pete Beach, FL 33706."

9. Defendant did not live at the St. Pete address at that time or at any time after the filing of this lawsuit; she has resided in Great Britain since the inception of this case. As a result,

Defendant did not receive the Motion for Leave to Withdraw, the Notice of Hearing thereon, or the Order Granting Motion to Withdraw. Worse yet, Defendant did not realize that said documents had been filed, or that her attorney had withdrawn, until after the Final Judgment of Foreclosure had already been entered.

10. Because she was not residing at the St. Pete address, and had no notice of her attorney's withdrawal, Defendant did not receive any of the documents that were subsequently filed in this case. To wit, the Notice of Hearing on Plaintiff's Motion for Summary Judgment reflects that it was sent to Defendant at the St. Pete address, not her Great Britain address. Likewise, the Amended Affidavit of Attorney as to Costs and Time Expended (served on September 21, 2011, less than 20 days before the October 4, 2011 summary judgment hearing) reflects that it was served upon Defendant at the St. Pete address, nor her Great Britain address.

11. As Defendant received no notice of the hearing on Plaintiff's Motion for Summary Judgment, and her prior attorney withdrew without notice to her, controlling Florida law requires that the Final Judgment of Foreclosure be vacated. See Coldiron v. Seminole County Sheriff's Dept., 974 So. 2d 1199 (Fla. 5th DCA 2008) (reversing an order denying a 1.540 motion where appellant never received notice of the summary judgment hearing after her lawyer withdrew and the order permitting withdrawal did not contain appellant's correct address); Saenz v. Pena, 754 So. 2d 826 (Fla. 3d DCA 2000) ("because the motion to withdraw was filed without notice to Saenz, in violation of the mandatory notice requirements of rule 2.060(j), Florida Rules of Judicial Administration, the motion to set aside judgment should have been granted."); Polani v. Payne, 654 So. 2d 202 (Fla. 4th DCA 1995) (requiring final judgment be vacated where appellants lived in a foreign country and their prior attorney did not provide their correct address upon his withdrawal as counsel).

12. Notably, these cases all clarify that the Final Judgment is void given the lack of notice. As such, even though Defendant has acted diligently in getting the Final Judgment vacated, the Final Judgment must be vacated regardless. See Polani, 654 So. 2d at 203 (requiring the final judgment be vacated in the face of appellees' arguments that appellants waited too long to vacate it, failed to monitor the status of the case, and failed to assert a meritorious defense).

13. Vacating the Final Judgment of Foreclosure may seem harsh, but the alternative is even worse. Quite simply, Defendant should not have lost this case where she was diligent enough to retain counsel, yet, as a result of counsel withdrawing without notifying her, she lacked notice of the subsequent summary judgment hearing. This is why Rule 2.505(f) (previously Rule 2.060(j)) has a notice requirement, and this is why Florida courts require that judgments be vacated where they were entered without notice after an attorney withdrew. See cases, supra.

14. In light of the foregoing, this Court should vacate the Final Judgment of Foreclosure and cancel the foreclosure sale scheduled for November 18, 2011.

VERIFICATION

I HEREBY CERTIFY under penalty of perjury that I have read the foregoing and the facts stated herein are true and correct.

Julianna Zakrzewska

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Edward Pritchard, Esq., Kass Shuler, P.A., 1505 N. Florida Ave., Tampa, FL 33601 on this ____ day of November, 2011.

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