DISTRICT COURT OF APPEAL
THE STATE OF FLORIDA

RICK KOIS,

Appellant,

Case No.: 2D12-

v.

L.T. No.: 2011-CA-00060 WH

VERICREST FINANCIAL, INC.,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

APPELLANTôS INITIAL BRIEF

Mark P. Stopa, Esquire
FBN: 550507
STOPA LAW FIRM
2202 N. Westshore Blvd.
Suite 200
Tampa, FL 33607
(727) 851-9551
ATTORNEY FOR APPELLANT

LE OF CONTENTS

LE OF CITATIONS

MENT OF THE CASE

Appellee, VERICREST FINANCIAL, INC. (ñVericrestò) initiated the lower court proceeding by suing Appellant, RICK KOIS (ñKoisò), for mortgage foreclosure. Appendix to Initial Brief, 1. Kois responded with a Motion to Dismiss, which remains outstanding. Appendix to Initial Brief, 2.

As of January 30, 2012, there had been no record activity in this case since July, 2011, when Vericrestôs counsel changed.[1] Appendix to Initial Brief, 3. As such, this Court entered its Order Setting Case Management Conference. In that Order, this Court directed the parties to attend a Case Management Conference on April 12, 2012 at 1:30 p.m., warning that ñfailure to appear will result in dismissal of the case.ò Appendix to Initial Brief, 4.

Appellantôs attorney, Joseph Milligan, personally appeared at the CMC, as required. Mr. Milligan waited until approximately 2:30 p.m. (an hour after the start of the hearing), until this case was called. Despite the extensive delay in getting started, nobody appeared for Vericrest. As such, on April 12, 2012, the Honorable Charles Lee Brown, who presided over the Case Management Conference, entered an Order Following Case Management Conference, wherein the Court dismissed this case without prejudice (ñOrder of Dismissalò). Appendix

[1] Vericrestôs counsel practices out of Miami Lakes, and this case is pending in Polk County. This is notable given Vericrestôs alleged attempt to use of ñlocal counselò in this case.

t point, this case was over ï the Order was a final Order of Dismissal, albeit without prejudice.

On April 16, 2012, the Honorable J. Michael Hunter entered an Order Setting Aside Dismissal. Appendix to Initial Brief, 6.

Vericrest did not file any sort of motion for rehearing, motion for reconsideration, affidavit, notice of hearing, or anything else directed towards this Courtôs Order of Dismissal. As such, it seems clear that Judge Hunter entered the April 16, 2012 Order Setting Aside Dismissal *sua sponte*, *ex parte*, without notice, and without hearing. Appendix to Initial Brief, 6, 7. Despite the lack of a hearing and the absence of evidence, Judge Hunter indicated ñlocal counsel for Plaintiff was tied up in another courtroom.ò[2] Appendix to Initial Brief, 6.

Believing the courtôs April 16, 2012 Order to be erroneous, Kois filed his Motion for Rehearing or to Vacate Order Setting Aside Dismissal (ñMotion to Vacateò), asserting various reasons why Judge Hunterôs *sua sponte*, *ex parte* Order Setting Aside Dismissal was erroneous. Appendix to Initial Brief, 7. For instance, how could this unnamed ñlocal counselò have been ñtied upò for over an hour without anyone knowing it? What was Judge Hunterôs basis for making this ruling

[2] Notably, Judge Hunter made this ñfindingò without identifying the name of the local counsel, the name of the judge before whom this unidentified counsel was ñtied up,ò the case/matter that attorney was handling, or even whether the ñother courtroomò was in Polk County. Appendix to Initial Brief, 5.

e CMC? And, perhaps most importantly, how could the court have so ruled *sua sponte*, without notice, without a hearing, and without evidence?

Unfortunately, the lower court would not give hearing times on the Motion to Vacate until June, well after the deadline to file an appeal before this Court, and established law indicates the Motion to Vacate did not toll the time bring an appeal. See Fla.R.App.Pro. 9.130(a)(5) (ñMotions for rehearing directed to these orders will not toll the time for filing a notice of appeal.ò). As such, Kois filed an Emergency Request for Hearing, hoping the lower court would provide a hearing date prior to Koisô deadline to file an appeal in this Court. Appendix to Initial Brief, 8. Unfortunately, even then, the lower court would not provide such a hearing, forcing Kois to prosecute this appeal without a hearing on the Motion to Vacate.

This timely appeal ensued.

ARY OF ARGUMENT

After many months where Vericrest failed to prosecute its own case, the lower court ordered a Case Management Conference, warning the parties that failure to attend ñwillò result in dismissal. Nonetheless, Vericrest failed to attend. As such, on April 12, 2012, Judge Brown entered an Order which appropriately dismissed this case without prejudice.

Vericrest never moved for rehearing and never appealed. Instead, four days after the Order of Dismissal, Judge Hunter issued an Order, *sua sponte*, without notice, without hearing, and without evidence, finding that some unidentified ñlocal counselò had been ñtied up in a different courtroom.ò As such, Judge Hunter vacated the Order of dismissal.

For three reasons, Judge Hunterôs Order Setting Aside Dismissal was legally erroneous and must be reversed/quashed.

First, the Order on review was erroneously entered *ex parte*, without notice, without a hearing, and without evidence. Although Fla.R.Civ.P. 1.530(d) allowed the court to *sua sponte* order a rehearing, the Rule did not allow the court to vacate its dismissal without conducting a hearing. Additionally, there was no basis for the court to find that some unidentified ñlocal counselò was ñtied up in another courtroomò without a hearing and without evidence proving same. At minimum,

hese issues.

Second, Judge Brown is the judge who entered the April 12, 2012 Order dismissing this case, so Judge Brown is the only judge who could have vacated it. Application of that rule of law may seem harsh, but the reasons for its existence seem particularly appropriate here. To wit, Judge Brown is the judge who presided over the April 12, 2012 hearing, so it strains logic to see why/how Judge Hunter could have a basis to vacate that Order, particularly *sua sponte* and without a hearing.

Third, even if ñlocal counselò had appeared yet was ñtied upò in another courtroom, attendance by an attorney who was not counsel of record was insufficient and a legal nullity under established precedent from this Court. As no counsel of record appeared at the hearing, dismissal was within the courtôs discretion.

This Court should reverse the Order Setting Aside Dismissal with instructions to reinstate the Order of Dismissal. Alternatively, at minimum, this Court should reverse and remand for an evidentiary hearing on the propriety of vacating the Order of Dismissal.

ARGUMENT

Appellate review of an order granting relief under Fla.R.Civ.P. 1.530(d) is generally done under the ñabuse of discretionò standard of review. See Leach v. Salehpour, 19 So. 3d 342 (Fla. 2d DCA 2009). However, where the issue is purely a question of law, the standard of review is *de novo*, see State Farm Mut. Auto. Ins. Co. v. Williams, 943 So. 2d 997 (Fla. 1st DCA 2006), and fact-findings are reviewed for competent, substantial evidence. See Sneed v. State, 934 So. 2d 475 (Fla. 3d DCA 2003).

Here, the basis of the Order Setting Aside Dismissal was the lower courtôs conclusion that ñlocal counsel was tied up in another courtroom.ò This finding of fact is reviewed for competent, substantial evidence. See Sneed. However, the ability of Judge Hunter to enter this Order in the first place (when Judge Brown entered the Order of Dismissal and presided over the CMC in question), the impact of a ñlocal counselò appearing at a CMC, and the propriety of the lower court entering the Order Setting Aside Dismissal without conducting a hearing are all questions of law which this Court should review *de novo*.

I. THE LOWER COURT ERRED WHEN IT VACATED ITS FINAL ORDER DISMISSING THIS CASE.

There are three separate and independent reasons why this Courtôs *sua sponte* Order vacating its final Order of dismissal was erroneous. Viewed

clear that said Order should be reversed and the final Order of dismissal reinstated.

A. The lower court erred by *sua sponte* vacating its Order of dismissal without notice, without a hearing, and without evidence.

A lower courtôs jurisdiction after a final Order is entered is quite limited. An aggrieved party can invoke the courtôs jurisdiction by moving for rehearing within ten days under Fla.R.Civ.P. 1.530, filing a Notice of Appeal within 30 days, or bringing a motion for relief under Rule 1.540. Here, Vericrest did not avail itself of any of those options, nor did it attempt to explain its failure to attend the court-ordered CMC. Rather, the lower court, acting *sua sponte*, vacated its final Order of dismissal entirely on its own. Hence, the initial issue before this Court is the circumstances under which a lower court may proceed *sua sponte* after its final Order of Dismissal.

The Florida Rules of Civil Procedure set forth two such circumstances. Fla.R.Civ.P. 1.530(d) authorizes a court to order a rehearing on its own initiative for any reason for which it might have granted a rehearing on motion of a party. Likewise, Fla.R.Civ.P. 1.540(a) authorizes a court to correct clerical errors ñarising from oversight or omission.ò Here, however, it seems clear the Order Setting Aside Dismissal could not have been entered pursuant to Rule 1.540(a). As the Fourth District has explained, that rule applies only when an Order was entered as

ñaccidental slip or omissionò:

> If the court mistakenly entered the modification order, this is a judicial mistake. This is not the type of mistake that may form the basis for relief under subsection (b) of Florida Rule of Civil Procedure 1.540. Subsection (a) of rule 1.540 allows the trial court to correct errors ñarising from oversight or omission é on its own initiative or on the motion of any party é The clerical mistakes referred to by subsection (a) are only ñerrors or mistakes arising from accidental slip or omission, and not errors or mistakes in the substance of what is decided by the judgment or order.

Moforis v. Moforis, 977 So. 2d 786 (Fla. 4th DCA 2008) (citing several cases). The Order of Dismissal was not a clerical error, but Judge Brownôs intentional decision to dismiss this case without prejudice given Vericrestôs failure to attend the court-ordered CMC. As such, under Moforis, Rule 1.540(a) cannot apply.

Lacking jurisdiction under Rule 1.540(a), the only basis for *sua sponte* relief lies within Rule 1.530(a). However, the face of that rule plainly requires a hearing be conducted before a lower court change its ruling. As the rule provides:

> é the court of its own initiative may order a rehearing or a new trial for any reason for which it might have granted a rehearing or a new trial on motion of a party.

Id. The phrase ñorder a rehearingò clearly indicates that the court can order that another hearing be scheduled, but cannot change its ruling without such a hearing. Quite simply, there is nothing in the Rule that allows a court to change its ruling without a hearing. Nonetheless, the lower court entered the Order Setting Aside

hearing. This was plainly not authorized, either under Rule 1.530(a) or otherwise. As the granting a hearing in this circumstance is a legal issue, this Court should apply a *de novo* standard of review and reverse. Quite simply, the absence of a hearing is dispositive and requires reversal.

Of course, the situation at bar is worse than just the failure to schedule a rehearing. Here, the court made *sua sponte* fact-findings, and vacated its Order of Dismissal based on those fact-findings, without notice and without any evidence.

Many Florida decisions have refused to uphold fact-findings where they are made without evidence. In other words, fact-findings must be supported by competent, substantial evidence, failing which reversal is required. See SA-PG Sun City Ctr., LLC v. Kennedy, 79 So. 3d 916 (Fla. 2d DCA 2012) (ñBecause the trial courtôs factual findings are not supported by competent, substantial evidence é we reverse and remandò); Tampa, HCB, LLC v. Bachor, 72 So. 3d 323 (Fla. 2d DCA 2011) (ñWe reverse because the trial courtôs factual findings were not supported by competent, substantial evidenceé ò); Shafer v. Shafer, 45 So. 3d 494 (Fla. 4th DCA 2010) (reversing where no competent, substantial evidence to support judgeôs finding); Sneed, 934 So. 2d at 477 (ñSince there is no competent, substantial evidence in the record to support the trial courtôs factual findings, they may not stand and we vacate the same.ò).

ide Dismissal was predicated on the fact-finding that ñlocal counsel was tied up in another courtroom.ò However, this finding was made without any evidence (much less competent, substantial evidence), without notice, and without a hearing. Respectfully, there was no basis for the court to make this ruling, without evidence, particularly without affording Kois the opportunity to be heard. This Court should reverse.

B. Judge Hunter was not authorized to vacate a final Order dismissing this case entered by Judge Brown.

The Florida Supreme Court has explained that a successor judge may not review, overrule, or change rulings of a predecessor judge:

> This Court is committed to the general proposition that a successor judge may not correct errors of law committed by his predecessor and hence he cannot review and reverse on the merits and on the same facts the final orders and decrees of his predecessor. é When parties are aggrieved by a decree an appeal should be taken rather than application made to another circuit judge é The case is authority for the rule that such is not a proper matter to be presented to another circuit judge but is a matter properly reviewable by appeal.

Groover v. Walker, 88 So. 2d 312 (Fla. 1956); see also Drdek v. Drdek, 79 So. 3d 216 (Fla. 4th DCA 2012) (ñwe agree with [appellant] that the principle enunciated in [Groover] applies, preventing Magistrate Kirgin and the circuit court from overruling Judge Bergerôs order on Magistrate Shearerôs report.ò).

from this principle of law by entering the Order Setting Aside Dismissal, which vacated a final Order of Dismissal entered by Judge Brown. Respectfully, this was error.

Adherence to the principle of law set forth in Groover may seem technical, but it is particularly appropriate on the facts at bar. To wit, Judge Brown presided over the April 12, 2012 Case Management Conference, and Judge Brown entered the Order of Dismissal. Hence, Judge Brown was the judge in the best position to know whether anyone appeared at the subject CMC for Vericrest, how long the hearing proceeded without such attendance, and the propriety of dismissal.

By contrast, with all due respect to Judge Hunter, how could he have had any basis to rule, *sua sponte*, that local counsel was ñtied upò in another courtroom, so as to justify the Order Setting Aside Dismissal? After all, Judge Brown presided over the CMC, and Judge Brown is the judge who observed Vericrestôs failure to attend the CMC despite an hour (from 1:30 until 2:30) to do so. Respectfully, absent some type of unauthorized, *ex parte* communication, it was necessarily impossible for Judge Hunter to have any basis whatsoever to have entered the Order on review.[3] As such, this is plainly a situation where the principle of law in Groover applies. This Court should rule accordingly.

---

[3] Kois supposes it is possible that Judge Hunter was the judge before whom the unidentified local counsel was ñtied upò in another courtroom. However, if that

eversal is appropriate, Kois respectfully submits that this is not a situation that lends itself to remand for a hearing. Vericrest never moved for rehearing and never filed an appeal, so once the Order Setting Aside Dismissal is vacated, there is no basis for lower court jurisdiction based on anything Vericrest has filed. Likewise, Judge Brown never initiated any *sua sponte* review, and the time to do so under Fla.R.Civ.P. 1.530(d) has passed, so there is no basis for a hearing on the courtôs own initiative, either. As such, while this Court cannot and should not prevent Vericrest from filing a motion under Rule 1.540, if appropriate, this is not a situation where this Court should reverse and remand for a hearing. Rather, this Court should simply reverse the Order Setting Aside Dismissal.

C. The lower court erred by vacating the dismissal because even if ñlocal counselò was ñtied up,ò actions by anyone who is not counsel of record are a nullity.

Fla.R.Jud.Admin. 2.505(e) sets forth three ways in which an attorney can appear as counsel in a lawsuit: (1) by filing and serving the partyôs first pleading or

---

were the case, then the Order Setting Aside Dismissal should (and, undoubtedly, would) have said so, yet it did not. In other words, if that is really what happened, it seems clear that Judge Hunter would have specified, in his Order Setting Aside Dismissal, ñAttorney John Doe was counsel for Vericrest, but he was in court before me for a hearing in Case No. 2011-CA-12345,ò not an Order reflecting only that some unidentified local counsel was ñtied upò in some other courtroom for some unspecified matter before some unspecified judge).

sel (with order of the court and written consent of the client); or (3) by filing and serving a notice of appearance.

In Pasco County v. Quail Hollow Props., this Court adjudicated the impact of an attorneyôs actions in a case when the attorney did not appear in one of the three ways authorized under Rule 2.505(e) (formerly Fla.R.Jud.Admin. 2.060(j)). 693 So. 2d 82 (Fla. 2d DCA 1997). Concluding any actions taken by an attorney who is not counsel of record are ña nullity,ò this Court explained:

> The reasons for requiring substitute attorneys to be officially recognized by the court and client are clear. The court must be able to rely on representations of attorneys because such representations bind the client. Initial pleadings of the various attorneys who are present at the beginning of a suit, signed in accordance with subsection (d) of rule 2.060 [now Rule 2.505], have the effect of notifying the court of that clientôs participation and his or her attorneyôs ñappearanceò in the suit. Notices of appearance for attorneys who come upon the scene at later dates have a similar effect on the court and other parties. The court and parties must know with whom they must deal. é
>
> The motion to dismiss that attorney Orcutt filed on February 20, 1996, a date when he had not yet filed a notice of appearance, was, therefore, a nullity.

Id. at 84.

In the case at bar, counsel for Vericrest practices out of Miami Lakes, yet this case is pending in Polk County. Appendix to Initial Brief, 5. Vericrestôs counsel of record did not attend the April 12, 2012 Case Management Conference and has made no attempt whatsoever to justify its failure in this regard. Appendix

seems (in light of Judge Hunterôs Order Setting Aside Dismissal) that Vericrest intended to have a ñlocal counselò[4] attend the April 12, 2012 Case Management Conference in its stead.

Under Quail Hollow and Fla.R.Jud.Admin. 2.505(e), even if ñlocal counselò had attended the CMC, that attendance would have been a nullity because that attorney would not have been counsel of record. As such, even taking Judge Hunterôs ñfindingsò as true, there was no basis to vacate the Order of Dismissal. After all, even had ñlocal counselò appeared at the April 12, 2012 CMC, that appearance would have been a legal nullity (and, hence, the equivalent of no appearance at all).

Deeming an appearance of a ñlocal counselò to be a nullity may seem like a harsh result, particularly where dismissal results. However, the result in Quail Hollow, where this Court reversed a final order of dismissal because the underlying motion was filed by an attorney who was not counsel of record, was no less harsh. Strict adherence to Rule 2.505(e) is required, as ñthe parties and the court must know with whom they must deal.ò Quail Hollow, 693 So. 2d at 84.

---

[4] Retaining ñlocal counselò is a common practice by plaintiffsô firms in foreclosure cases. Where counselôs office is a significant distance from the court in a pending case, and counsel does not want to have to travel, counsel retains an attorney from a different law firm who resides close to the courthouse to ñcoverò hearings. The problem, of course, is that ñlocal counselò (or ñcoverage counsel,ò as it is also called) is not counsel of record, having never appeared in the case.

gned respectfully submits that the widespread utilization of ñlocal counselò very much contributes to the poor lawyering in foreclosure cases evident before this Court and the circuit courts on a regular basis, making an overburdened judiciary work even harder than necessary.[5] Respectfully, this should change. To illustrate, Vericrestôs counsel appeared as counsel in this Polk County case even though its offices are in Miami Lakes. Vericrest did nothing to prosecute the case for several months, forcing the Court to *sua sponte* schedule a CMC. Vericrest was warned, in writing, that failure to attend that CMC ñwillò result in the case being dismissed, yet Vericrest treated the CMC so flippantly that it apparently[6] tried to send a ñlocal counselò to the CMC. Then, even after the case was dismissed for failure to attend the CMC, Vericrest never filed an affidavit explaining its failure to attend, never moved for rehearing, and never appealed. Respectfully, the cavalier manner in which Vericrest and its counsel of record treated this situation justifies what may seem to be a harsh result. In other words, strict adherence to the principle of law in Quail Hollow will ensure

[5] In the undersignedôs respectful opinion, it is difficult to convey the extent to which these ñlocal counselò are thoroughly unprepared, time and time again, to argue duly-noticed hearings in foreclosure cases. Many times, this is not necessarily their fault, as they are retained one day before a hearing without any paperwork, forcing them to argue contested matters with no paperwork whatsoever. Quite simply, the out-of-town attorneys handling these foreclosure cases are far too cavalier.

[6] Of course, the finding that a ñlocal counselò was ñtied upò was without evidence or record support. See Issue I of this Initial Brief.

edible burden our courts face *vis a vis* foreclosure cases.

On its face, the lower courtôs Order Setting Aside Dismissal did not set forth a basis to vacate the Order of Dismissal. After all, even if ñlocal counselò were ñtied up,ò local counselôs appearance at the CMC would have been a nullity, and dismissal would/should have resulted anyway. This Court should reverse.

CONCLUSION

This Court should reverse the Order Setting Aside Dismissal with instructions to reinstate the Order of Dismissal. Alternatively, at minimum, this Court should reverse and remand for an evidentiary hearing on the propriety of vacating the Order of Dismissal.

FICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Morales Law Group, P.A., 14750 NW 77th Court, Suite 303, Miami Lakes, FL 33016 on this ____ day of May, 2012.

_____

Mark P. Stopa, Esquire
FBN: 550507
STOPA LAW FIRM
2202 N. Westshore Blvd.
Suite 200
Tampa, FL 33607
(727) 851-9551
ATTORNEY FOR APPELLANT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Initial Brief complies with the font requirements of Fla.R.App.P. 9.210(a).

_____

Mark P. Stopa, Esquire