

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR
POLK COUNTY, FLORIDA, CIVIL ACTION

THE BANK OF NEW YORK MELLON F/K/A
THE BANK OF NEW YORK, TRUSTEE FOR
THE CERTIFICATEHOLDERS CWALT, INC.
ALTERNATIVE LOAN TRUST 2005-86CB
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-86CB ,

Plaintiff

vs.

MICHELLE NOBLE, et al.,

Defendant(s)

CASE NO.: 2011CA-005656-0000-00

COPY

MOTION HEARD, CONSIDERED

AND DENIED

THIS January 13 2014

Charles M. Wilhite
JUDGE

**PLAINTIFF'S MOTION FOR RELIEF FROM
ORDER OF DISMISSAL**

COMES NOW, Plaintiff, THE BANK OF NEW YORK MELLON F/K/A THE BANK OF
NEW YORK, TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE
LOAN TRUST 2005-86CB MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-86CB,
and pursuant to Rule 1.540(b) hereby files its Motion for Relief from Order of Dismissal entered in this
matter, and states as follows:

BACKGROUND AND FACTS

This is a mortgage foreclosure action of a certain mortgage recorded in the Official Records
Book 6545, at Page 1253 of the Public Records of Polk County, Florida. Defendant defaulted on the
note and mortgage owned by Plaintiff in that the payment due November 1, 2010 and all subsequent
payments have not been made. Plaintiff declared the full amount due under the note and the mortgage
and filed the instant action.

This matter was originally brought on behalf of Plaintiff by the law firm of Smith, Hiatt, &

CA13-03569-T/WN

Diaz, P.A. There was a transfer of this file on or about June of 2013 to the undersigned's firm, Florida Foreclosure Attorneys, PLLC. During the transfer process, the case management conference scheduled on July 22, 2013, was overlooked and never calendared appropriately by the undersigned's transfer department. Due to this oversight, counsel for Plaintiff never appeared for the July 22 case management conference and this matter was dismissed without prejudice (see attached Exhibit "A" Order Following Case Management Conference).

The undersigned, who works in the firm's litigation department of the respective firm, discovered the court's Order of Dismissal and thereafter diligently files this motion for relief from the same.

STANDARD

There is a strong preference for lawsuits to be decided on the merits, and thus courts should liberally set aside default judgment under appropriate circumstances. Marshall Davis, Inc. v. Incappo, Inc., 558 So.2d 206 (Fla. 2nd DCA 1990). The civil procedure rule granting relief from judgment envisions an honest mistake made during the regular course of litigation, including those that result from oversight, neglect, or accident. Paladin Properties v. Family Inv. Enterprises, 952 So.2d 560 (Fla. 2nd DCA 2007).

EXCUSABLE NEGLIGENCE

Where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation the matter should be permitted to be heard on merits. Somero v. Hendry Gen. Hops., 467 So.2d 1103 (Fla. 4th DCA); Miami-Dade County v. Coral Bay Section C Homeowner's Ass'n, Inc., 979 So.2d 318 (Fla. 3rd DCA 2008); See also Plotkin v. Deatrick Leaking Co., 267 So.2d 368 (Fla. 3rd DCA 1972) (failure to follow corporate procedures,

amounting to corporate inefficiency, nonetheless constituted neglect). Further, reasonable confusion as a result of pendency of cases involving either the same or related subject matter or parties amounts to excusable neglect. Sunstate Courier, Inc. v. Byron, 629 So.2d 1095 (Fla. 4th DCA 1994); Okeechobee Imps., Inc., v. American Sav. & Loan Ass'n, 558 So.2d 506 (Fla. 3^d DCA 1990). See also American Agronomics Corp. v. Varner, 413 So.2d 484 (Fla. 2^d DCA 1982).

It was not due to deliberate disregard for the Court's order that local counsel failed to appear at the case management conference. Where the clerical staff inadvertently mishandled legal papers, the third District Court of Appeals found it to be excusable neglect and vacated a default judgment. Hialeah, Inc. v. Adams, 566 So.2d 350 (Fla. 3rd DCA 1990). Also, Insurer was entitled to vacatur of default judgment entered for its failure to file timely response to complaint, as it demonstrated excusable neglect, due diligence and meritorious defenses; insurer had received, but misplaced complaint, and upon receiving notice that default had been entered promptly sought to have default set aside and furnished proposed answer recounting meritorious defenses to claim for insurance coverage. Credit General Ins. Co. v. Thomas, 515 So.2d 336 (Fla. 3rd DCA 1987). Similarly, in the case at hand due to mishandling of the Court's order, local counsel was not aware of the pending trial. Local counsel's failure to appear was neither willful nor intentional. J.J.K. Intern., Inc. v. Shivbaran, 985 So. 2d 66, 69 (Fla. 4th DCA 2008) (holding that "the technicality of . . . counsel's failure to appear should not decide the entire case especially when the failure was due to innocent secretarial error).

DUE DILIGENCE

It is well-established that issues of "due diligence" and "reasonable time," in common with all questions relating to the issue of whether defaults and default judgment should stand, must be evaluated in terms of the particular set of facts of the case under consideration. Franklin v. Franklin, 573 So.2d 401 (Fla. 3rd DCA 1991). Although in Techvend v. Phoenix Network, Inc., 564 So.2d 1145 (Fla. 3rd DCA 1990), the Court developed a twenty day rule of thumb to file a motion for relief under Rule

1.540, the Franklin Court granted relief even after the motion was filed nine months after judgment finding due diligence.


Attached hereto as Exhibit "B" and Exhibit "C" are the Sworn Affidavits of Rebekah Sweeney and John Gombocs, respectively, in Support of Motion to Vacate Order of Dismissal. Rebekah Sweeney and John Gombocs are the legal assistants who prepare transfer files and calendar upcoming hearings for the undersigned attorney. Due to their mistake, inadvertence, or excusable neglect, the case management conference was never calendared. Accordingly, Plaintiff's counsel was prevented from appearing at this hearing. Thereafter, undersigned diligently moved to investigate the matter and prepared this motion to set aside the same order.

In an attempt to vacate this order, Plaintiff has diligently requested so, in compliance with the Florida Rules of Civil Procedure, demonstrating excusable neglect and due diligence.

WHEREFORE, Plaintiff respectfully requests the Honorable Court to grant it relief from its Order of Dismissal without Prejudice against the Plaintiff entered on July 22, 2013, and for such further relief as the court may deem just and proper.

I HEREBY CERTIFY that on November 7, a true and correct copy of the foregoing has been electronically filed with the Clerk of Courts by way of the CM/ECF system. I further certify that on said date a true and correct copy of the foregoing has been furnished either by e-mail, or by U.S. Mail, to those indicated on the attached Service List.

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