IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY FLORIDA

NORMA CARMONA,

Appellant,

v.

KENNETH WHITE and EMILY WHITE,

Appellee.

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APPELLATE DIVISION (CIVIL)
CASE NO.: 502006AP000059XXXXMB
L.T.: 2006CC001566XXXXMB
Division: 'AY'

Opinion filed: MAR 26 2007

Appealed from the County Court in and for Palm Beach County Judge James L. Martz.

For Appellant: Charles Wender, Esq., 190 West Palmetto Park Road, Boca Raton, FL 33432.

For Appellee: David Andrew Ray, Esq., 350 East Las Olas Boulevard, Suite 1700, Fort Lauderdale, FL 33301.

PER CURIAM

This is an appeal from a Default Final Judgment against Appellant, Norma Carmona, in favor of Appellees, Kenneth and Emily White.

Ms. Carmona was the owner of property located on Winding Woods Drive. On October 25, 2005, the Whites purportedly entered into a contract for the sale and purchase of said property. Ms. Carmona, however, later informed the Whites that her husband's signature had been forged, that she no longer wanted to proceed with the sale of the property, and implied she did not have authority to execute the agreement on his behalf.

On February 6, 2006, the Whites filed a two-count Complaint against Ms. Carmona, alleging fraud in the inducement or, alternatively, breach of contract. The Whites attempted service on Winding Woods Drive, but were unsuccessful given that Ms. Carmona no longer lived at that location. The Whites subsequently hired a private investigation firm, which determined Ms. Carmona resided on Turnberry Circle. As a result, substituted service was attempted at the Turnberry Circle location on Ms. Carmona's father.

The Clerk of the Court entered a Default against Ms. Carmona for failure to serve any pleadings or papers. On June 28, 2006, the Whites filed their Amended Motion for Default Final Judgment. Ms. Carmona subsequently filed a Motion to Vacate Default and Quash Service of Process. Following a hearing on August 2, 2006, the trial court entered Default Final Judgment against Ms. Carmona and denied Ms. Carmona's Motion to Vacate Final Judgment.

Section 48.031(1)(a), Florida Statutes (2007), permits substituted service by delivery of process to a person's "regular place of abode." Courts have interpreted "regular place of abode" as "where a person actually lives" at the time of service. *Aero Costa Rica, Inc., v. Dispatch Servs., Inc.*, 710 So. 2d 218, 219 (Fla. 3rd DCA 1998). Given that the Whites attempted service of process pursuant to § 48.031(6), Fla. Stat. (2007), § 48.031(1)(a), Fla. Stat. (2007), is inapplicable.

Perfection of substituted service of process requires strict compliance with statutory requirements because such service is an exception to personal service. *Aero Costa Rica*, 710 So. 2d at 219. Section 48.031(6), Fla. Stat. (2007), provides: "if the only address for a person to be served, which is discoverable through public records, is a private mailbox, substitute service may made by leaving a copy of the process with the person in charge of the mailbox, but only if the process server

determines that the person to be served maintains a mailbox at that location." Although Florida has not interpreted the precise meaning of "private mailbox," there is persuasive authority that has construed it in the context of a mailbox service. *See, e.g., Wright v. B & L Properties, Inc.*, 113 Wash.App. 450, 53 P.3d 1041 (2002); *Washington School Employees Credit Union v. Rodriguez*, 123 Wash.App. 1032 (2004); *Montesdeoca v. Krams*, 194 Misc.2d 620, 755 N.Y.S.2d 581 (2003). We conclude it was error for the trial court to deny Ms. Carmona's Motion to Quash Service of Process.

Furthermore, Florida public policy favors setting aside defaults so that controversies can be determined on its merits. *Jeyanandarajan v. Freedman*, 863 So. 2d 432, 433 (Fla. 4th DCA 2003). Therefore, when a court reviews a motion to vacate a Clerk's default, it should be resolved in favor of granting the motion to vacate if any reasonable doubt exists. *Id.* To be relieved of a default, a party must show excusable neglect, a meritorious defense, and due diligence. *Gibson Trust, Inc. v. Office of the Attorney General*, 883 So. 2d 379, 382 (Fla. 4th DCA 2004).

The timing of entry of default, however, is critical. Where a default final judgment has been entered, mere conclusory assertions or general denials are insufficient to establish a meritorious defense, without sufficient allegations of supporting ultimate fact. *Id.* On the other hand, where an interlocutory order of default has been entered, but not a final judgment, a general denial will suffice to establish a meritorious defense. *Id.* at 383 (quoting *Moore v. Powell*, 480 So. 2d 137, 138 (Fla. 4th DCA 1985)).

Ms. Carmona filed a Motion to Vacate Default after the Clerk's Default was entered, but prior to the trial court's entry of Default Final Judgment. Ms. Carmona also attached an Affidavit

containing a conclusory assertion of a meritorious defense to her Motion to Vacate Default. Therefore, the Affidavit alleging a meritorious defense was sufficient. Accordingly, it was error for the trial court to deny the Motion to Vacate Default.

Ms. Carmona also filed a Motion for Appellate Attorney's Fees pursuant to Florida Rule of Appellate Procedure 9.400(b) and § 57.105, Fla. Stat. (2007). However, attorney's fees in an appellate case can only be awarded if authorized by contract or statute. *Hornsby v. Newman*, 444 So. 2d 90, 91 (Fla. 4th DCA 1984) (*quoting Elswick v. Martinez*, 394 So. 2d 529, 530 (Fla. 3rd DCA 1981)). There was not a contractual basis for awarding attorney's fees given that the contract of sale and purchase did not contain an "attorney fee provision." Likewise, since a reasonable attorney fee shall be awarded to the prevailing party in a civil action only if the losing party's attorney knew or should have known at any time that a claim or defense "was not supported by the material facts," there was not a statutory basis for awarding attorney's fees either. § 57.105, Fla. Stat. (2007). In addition, the Whites improperly requested an award of attorney's fees in the Response to Motion for Appellate Attorney Fees. Based on the foregoing,

This case is **REVERSED AND REMANDED** for further proceedings consistent with this opinion. Appellant's Motion for Appellate Attorney's Fees filed pursuant to Fla. R. App. P. 9.400(b) and § 57.105, Fla. Stat. (2007), is **DENIED**.

FINE, MCCARTHY, and GERBER, JJ., concur.