

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA**

**MR SONS INVESTMENT CO.,
INC., and MANNY RIVERS,**

CASE NO.: CVA1 07-69
County Court Case No. 2005-CC-16739-O

Appellants,

vs.

**DWIGHT MCDOWELL and
CHERYL MCDOWELL,**

Appellees.

Appeal from the County Court,
For Orange County,
Carolyn B. Freeman, County Judge.

O. Gustavo Padron, Esquire,
for Appellants.

Dwight McDowell, pro se,
and Cheryl McDowell, pro se,
for Appellees.

Before POWELL, BLACKWELL, T. SMITH, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING LOWER COURT

Appellants/Defendants timely appeal the trial court's "Order Denying Defendant's Motion To Vacate And Set Aside Final Judgment Entered August 3, 2007," entered on October 1, 2007. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

According to the order appealed from, the default final judgment was based upon Appellants' and Appellants' counsel's failure to appear at a show cause hearing on August 3, 2007. On September 17, 2007, the trial court judge conducted an evidentiary hearing on Appellants' motion to set aside the final judgment. All parties were present at the September 17, 2007, hearing. In the three-page order denying Appellants' motion to set aside, the trial court judge made detailed findings and concluded as a matter of fact that Appellants received notice of the August 3, 2007, hearing and failed to appear.¹

The fatal flaw in Appellants' appeal is that they did not furnish a transcript of the proceedings of the September 17, 2007, hearing. It is a fundamental rule of law that "[i]n appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979). Where the evidence is conflicting, it is for the trial court, not the appellate court, to evaluate and weigh the testimony and documentary evidence adduced at the hearing. See Hillier v. City of Plantation, 935 So. 2d 105 (Fla. 4th DCA 2006). Accordingly, it is an appellant's responsibility to provide the appellate court with a transcript of proceedings from which the order appealed emanates.² Where, as here, an appellant has not provided such a transcript, the appellate court "must give utmost credence to (the trial judge's) fact findings, and assume there was the best imaginable evidence to support them." Hudson Pest Control, Inc. v. Westford Asset Mgt., Inc., 622 So. 2d 546, 547 (Fla. 5th DCA 1993). Thus, where a trial judge's decision turns solely upon disputed facts and no transcript has been provided, the appellate court

¹ We also note that Appellants' motion was legally insufficient. Paragraph 3 merely stated "[t]hat the Defendant has a valid defense which he was prepared to present to the Court at the trial." (R. at 616.) It does not allege ultimate facts which would support this bare conclusion. For this reason, Appellants failed to show that they had a meritorious defense. It would be correct to deny the motion on this ground alone. See Abray Constr. Co., Inc. v. Star Swimming Pools, Inc., 426 So. 2d 1046 (Fla. 2d DCA 1983).

² See 3 Fla. Jur. 2d Appellate Review § 192 (2009) and the cases cited therein.

has no authority to set aside the trial judge's decision and it is required to affirm. See Applegate, 377 So. 2d at 1152.

For the foregoing reasons, we conclude that the trial judge did not abuse her discretion in denying Appellants' motion to set aside. It is hereby **ORDERED AND ADJUDGED** that the trial court's "Order Denying Defendant's Motion To Vacate And Set Aside Final Judgment Entered August 3, 2007," is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 27 day of OCTOBER, 2009.

/S/

ROM W. POWELL
Senior Judge

/S/

ALICE L. BLACKWELL
Circuit Judge

/S/

THOMAS B. SMITH
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **O. Gustavo Padron, Esquire**, 517 West Colonial Drive, Orlando, Florida 32804 and **Dwight and Cheryl McDowell**, Post Office Box 555516, Orlando, Florida 32855 on this 27 day of OCTOBER, 2009.

/S/

Judicial Assistant