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

MULVA H. PEARSON,

Appellant,

v.

SILVER GLEN HOMEOWNERS ASSOCIATION, INC.,

Appellee.
_____/

CASE NO.: 2014-CV-000028-A-O
Lower Case No.: 2012-CC-010207-O

Appeal from the County Court, for Orange County, Florida, A. James Craner, County Judge.

Clifford J. Geismar, Esquire, for Appellant.

Robyn Marie Severs, Esquire, for Appellee.

Before ROCHE, O'KANE, and APTE, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

Appellant, Mulva Pearson ("Pearson"), timely appeals the Trial Court's Order Denying Rehearing entered on April 1, 2014 as to the Default Final Judgment entered on February 12, 2014 in favor of Appellee, Silver Glen Homeowners Association, Inc. ("Sliver Glen"). This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

Summary of Facts and Procedural History

Pearson is the owner of real property in Ocoee that is subject to the covenants and restrictions of the Silver Glen subdivision. In correspondence dated January 21, 2011, October 25, 2011, March 27, 2012, and May 16, 2012, Silver Glen notified Pearson that she was in violation of the restrictive covenants relating to the landscaping of her property and demanded that she cure the violations. Pearson did not cure the violations.

On July 23, 2012, Silver Glen filed its Verified Complaint for injunctive and declaratory relief. Pearson did not timely respond to the Verified Complaint. On November 6, 2013, Silver Glen filed a Motion for Default Final Judgment and Motion for Attorneys' Fees and Court Costs. On February 4, 2014, a hearing was held addressing these Motions. At the hearing, Pearson appeared pro se and filed a Motion to Dismiss alleging that she was not served with the Complaint, had no notice of the hearing, and that the lawsuit was retaliatory and frivolous. The Court Minutes reflect that the court heard testimony from Silver Glen's property manager and from Pearson, but a court reporter was not present. Also, at the hearing, the Trial Court ruled that Pearson's motion to dismiss "regarding notice and retaliatory action" was denied and a Default Judgment was entered.

After the hearing, later on the same day, Pearson filed a Motion to Set Aside Default Final Judgment. The Motion to Set Aside reiterated that she was not served, that she did not have notice of the hearing, and that she would like the judgment set aside so that she could hire an attorney. On February 12, 2014, the Trial Court entered the written Default Final Judgment. Also, on February 12, 2014, Pearson obtained counsel who filed a Notice of Appearance. On February 21, 2014, Pearson's counsel filed a Motion for Rehearing which then was heard by the Court on March 17, 2014. The Court Minutes of that hearing reveal that Silver Glen's attorney,

Pearson, and her attorney were present, but again a court reporter was not present. At this hearing the Trial Court denied the Motion for Rehearing and on April 1, 2014 entered the written Order Denying Motion for Rehearing that Pearson now appeals.

Arguments on Appeal

On appeal, Pearson argues: 1) The Trial Court erred by not holding an evidentiary hearing to address her allegation that she was not served with the Complaint; 2) The Trial Court erred in denying her Motion for Rehearing; and 3) The Final Default Judgment should be set aside because the Trial Court failed to address her Motion to Set Aside Default Judgment.

Conversely, Silver Glen argues that the Trial Court's decision should be affirmed because: 1) Two hearings were held concerning Pearson's allegations of lack of service; 2) The Trial Court did not err in denying Pearson's Motion for Rehearing; and 3) The record fails to reflect any error by the Trial Court in entering the Final Default Judgment.

Also, both parties filed motions for appellate attorneys' fees per sections 59.46 and 720.305, Florida Statutes, and Article VI, Section 2 of Silver Glen's Declaration of Covenants and Restrictions.

Standard of Review

The standard of review for denying a motion for rehearing is abuse of discretion. *J.J.K. Int'l, Inc. v. Shivbaran*, 985 So. 2d 66, 68 (Fla. 4th DCA 2008). Also, it is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1980); *Wright v. Wright*, 431 So. 2d 177, 178 (Fla. 5th DCA 1983).

Analysis

Pearson's First Argument: Pearson argues that the Trial Court's decision should be reversed because the Trial Court erred by not holding an evidentiary hearing to address her allegation that she was not served with the Complaint and she argues that the only record evidence regarding service, or lack thereof, is her Affidavit stating that she was not served. Pearson's argument lacks merit as follows:

Per the record, it appears that hearings were held to address Pearson's claim that she was not served with the Complaint. First, Pearson filed her Motion to Dismiss on February 4, 2014 at 11:00 a.m. at the time of the first hearing and per the Court Minutes, the Trial Court denied the Motion after hearing the testimony from Silver Glen's property manager and from Pearson. Thereafter, per the Court Minutes, another hearing was held on March 17, 2014 where the Motion for Rehearing was denied.

Also, the Progress Docket reveals that an Affidavit of Service was filed in the lower court on September 19, 2013. Thus, it appears that the Trial Court had both the Affidavit of Service and Pearson's Affidavit to review when the decision was rendered. However, the Affidavit of Service itself was not included in the record on appeal. Further, as Silver Glen correctly points out, an affidavit of service which is regular on its face is presumed valid. Thus, in this case Pearson cannot impeach the validity of the Affidavit of Service by merely denying that she received it. Pearson was required to come forward with clear and convincing evidence to corroborate her denial and to overcome the presumption that the Affidavit of Service was valid. *See Emmer v. Brucato,* 813 So. 2d 264, 266 (Fla. 5th DCA 2002); *Telf Corp. v. Gomez*, 671 So. 2d 818 (Fla. 3rd DCA 1996); *Panama City Gen. P'ship v. Godfrey Panama City Inv., LLC*, 109 So. 3d 291, 293 (Fla. 1st DCA 2013). Whether the presumption of validity is overcome requires

that a factual determination be made. *Emmer*, 813 So. 2d at 266. Per the Court Minutes from the hearing on February 4, 2014, it appears that the Trial Court made a factual determination because both Pearson and the Association's property manager testified and the Trial Court then denied her Motion to Dismiss. However, because the record on appeal lacks the Affidavit of Service and hearing transcripts and without knowing the factual context, appellate review can go no further to determine whether factual findings were made in error. *Applegate*, 377 So. 2d at 1152 (holding that in the absence of an adequate record, the appellate court will have no alternative but to presume the decision is correct); *Wright*, 431 So. 2d at 178 (explaining that it is well established that the findings and judgment of the Trial Court comes to the appellate court with a presumption of correctness, may not be disturbed in the absence of a record demonstrating error, and the burden is on the appellant to bring before the appellate court a record adequate to support the appeal).

Pearson's Second Argument: Pearson argues that The Trial Court erred in denying her Motion for Rehearing. Pearson's Motion for Rehearing re-alleged that she was not served with the Complaint and again there is no record evidence to corroborate her statement other than her own Affidavit denying service. Thus, as Silver Glen correctly argues, Pearson fails to provide any legal or factual basis to support a finding that the Trial Court abused its discretion when it denied her Motion for Rehearing. Also, because there is no transcript from the hearing addressing the Motion for Rehearing, appellate review cannot go further to determine whether the Trial Court abused its discretion by denying the Motion.

Pearson's Third Argument: Pearson argues that the Final Default Judgment should be set because the Trial Court failed to address her Motion to Set Aside Default Judgment. Again as Silver Glen argues, Pearson fails to provide any legal or factual support for her position. First,

Pearson has not argued that the Final Default Judgment is flawed on its face and a review of such Judgment does not reveal any error and without a transcript of the hearing addressing the Motion for Default Final Judgment, it must be assumed that the judgment was correctly rendered. *See Zarate v. Deutsche Bank Nat'l Trust Co.*, 81 So. 3d 556, 558 (Fla. 3d DCA 2012) (holding that without a record of the testimony of witnesses or of evidentiary rulings, a judgment that is not fundamentally erroneous on its face must be affirmed).

Further, the Motion was filed at 4:00 p.m. on February 4, 2014 after the hearing was held that same day at 11:00 a.m., where the court granted the Motion for Default Final Judgment. Also, per the Progress Docket, on February 18, 2014, a Notice of Hearing for May 1, 2014 was filed in the lower court. However, because Pearson filed her Notice of Appeal on April 16, 2014, the Trial Court lost jurisdiction of the case and could not proceed forward with the hearing scheduled for May 1, 2014. All motions filed by an appealing party are deemed abandoned upon the filing of the Notice of Appeal. Fla. R. App. P. 9.020(i)(3).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED**:

1. The Trial Court's Order Denying Rehearing entered on April 1, 2014 as to the Default Final Judgment entered on February 12, 2014 is **AFFIRMED**.

2. Appellee's Motion for Attorneys' Fees filed July 14, 2014 is **GRANTED** and the assessment of those appellate attorneys' fees is **REMANDED** to the Trial Court.

3. Appellant's Motion for Attorneys' Fees filed July 28, 2014 is **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 26th day of September, 2014.

/S/
RENEE A. ROCHE
Presiding Circuit Judge

O'KANE and APTE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **Clifford J. Geismar, Esquire**, The Law Office of Clifford J. Geismar, P.A., 2431 Aloma Avenue, Suite 109, Winter Park, Florida 32792 and **Robyn Marie Severs, Esquire**, Becker & Poliakoff, P.A., 100 Whetstone Place, Suite 101, St. Augustine, Florida 32086, on this 29th day of September, 2014.

/S/
Judicial Assistant