DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

JAMES GAYOSO,
Appellant,

v.

KERRY GAYOSO,
Appellee.

No. 4D10-2048

[June 6, 2012]

PER CURIAM.

James A. Gayoso ("James") appeals the trial court's entry of a final judgment of injunction for protection against domestic violence ("final injunction") and the trial court's denial of his motion to vacate the final injunction. We reverse and remand to the trial court for an evidentiary hearing on the issue of whether Gayoso had notice of the final hearing on the injunction.

On March 2, 2010, Kerry Gayoso ("Kerry") filed a petition for injunction for protection against domestic violence, seeking protection from James, temporary exclusive use of the martial home, temporary timesharing, and counseling and treatment for James. A temporary injunction was entered the same day. The first page of the temporary injunction informed the parties that a final hearing would be held on March 15, 2010, at 9:30 a.m. A proof of service from the Plantation Police Department shows that personal service was effected on James at the parties' residence on March 7, 2010. However, a return of service from the Broward Sheriff's Office shows attempts at service on March 5 and March 10, but James could not be located. The trial court issued a final injunction on March 15, 2010. According to the injunction, only Kerry and her attorney attended the hearing. The trial court awarded Kerry all relief asked for in the petition for injunction, plus $1200.00 per month in child support.

Eleven days after the final injunction was entered, James filed a motion to vacate the final injunction or, in the alternative, for rehearing. We read the motion to vacate as one seeking relief under Florida Rule of

Civil Procedure 1.540(b). The motion alleged that James did not receive notice of the final hearing and the final injunction lacked adequate factual findings regarding the award of child support. Attached to the motion were two affidavits attesting that neither James nor his attorney received notice of the final hearing. The trial court denied the motions without explanation on April 19, 2010.

James argues the final injunction was void because he was not served with process and his counsel was given no notice of the hearing. At the very least, he asserts that the trial court should have held an evidentiary hearing, based on the factual issues raised in his affidavits. Kerry argues that the record clearly reflects James was served with the temporary injunction and cites other evidence that James or his attorney knew or should have known of the date of the final hearing.

James was entitled to an evidentiary hearing on the sufficiency of service of the temporary injunction because the contents of the affidavits supporting the motion, if true, would have invalidated the purported service and nullified the court's personal jurisdiction over him. This was the holding in *Southeastern Termite & Pest v. Ones*, 792 So. 2d 1266 (Fla. 4th DCA 2001). There, a corporation moved to set aside a clerk's default on grounds there was no valid service of process. The process server's affidavit stated that the corporation's president was served at his residence. *Id.* at 1267. The president filed an affidavit stating that he never received the summons and that he had moved from the address where service was supposedly made five weeks before the date of service. We noted that the certificate of service was presumptively valid, but held that "where the contents of an affidavit supporting a defendant's contention of insufficiency of service would, if true, invalidate the purported service and nullify the court's personal jurisdiction over the defendant, the trial court should hold an evidentiary hearing before deciding the issue." *Id.* at 1268*; see also Fern, Ltd. v. Road Legends, Inc.*, 698 So. 2d 364 (Fla. 4th DCA 1997). We also noted that a defendant seeking to overcome a presumptively valid certificate of service had the burden of proof to prove lack of service by clear and convincing evidence. *Southeastern Termite,* 792 So. 2d at 1268.

Here, James contested service and filed two affidavits disputing that service was performed. Therefore, we find the trial court erred in failing to hold an evidentiary hearing. On remand, the parties can present all the factual evidence cited in their briefs that supports or refutes the contention that service occurred. If the trial court rules in favor of James at the evidentiary hearing, then the final injunction should be set aside and a new hearing scheduled. If the trial court rules in favor of Kerry,

then the final injunction stands.

On this appeal, we lack jurisdiction to reach the second issue James raises—that the trial court abused its discretion by awarding child support without making required factual findings.

First, we note that insofar as James's motion was one for rehearing, it was untimely, because it was filed more than ten days after entry of the final injunction. *See* Fla. R. Civ. P. 1.530(b). Therefore, the motion for rehearing did not toll the time to file an appeal. *Hunt v. Forbes*, 65 So. 3d 133, 134 (Fla. 4th DCA 2011). James filed his notice of appeal on May 13, 2010, more than thirty days after entry of the final injunction, but less than thirty days after the order denying the motion to vacate. Therefore, this court has jurisdiction to review only the order denying the Rule 1.540(b) motion, which is reviewed as a non-final order under Florida Rule of Appellate Procedure 9.130(a)(5).

The claim that the trial court abused its discretion in awarding $1200.00 per month in temporary child support cannot be raised in a motion to vacate a judgment under Florida Rule of Civil Procedure 1.540(b). That rule allows relief from a judgment in only five circumstances:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.

"Failing to make factual findings" does not fall under any of these five categories. If the motion for rehearing had been timely filed or the notice of appeal been filed within thirty days of entry of the final injunction, we would have had jurisdiction to review this issue. Because they were not timely filed, we do not have jurisdiction. Of course, if the trial court sets aside the final injunction, then the issue of child support can be relitigated.

Reversed and remanded for an evidentiary hearing.

POLEN, GROSS and CONNER, JJ., concur.

* * *

Appeal of final and non-final orders from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Michael G. Kaplan, Judge; L.T. Case No. 10-1184 DVCE (59).

Jay A. Gayoso of Jay A. Gayoso, P.A., Aventura, for appellant.

Nancy W. Gregoire of Kirshbaum, Birnbaum, Lippman, & Gregoire, PLLC, and Mindy E. Jones of Coast to Coast Legal Aid of South Florida, Inc., Fort Lauderdale, for appellee.

Not final until disposition of timely filed motion for rehearing.