DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

WLT SOFTWARE ENTERPRISES, INC.,

Appellant,

v.

CHARLES BROOKS; ANN MARIE BROOKS; and THOMAS BROOKS,

Appellees.

No. 2D22-3150

May 19, 2023

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Pinellas County; George Jirotka, Judge.

Sean M. Wanger and Andrew J. Mongelluzzi of Clearwater Business Law, LLC, Clearwater, for Appellant.

Duane A. Daiker of Shumaker, Loop & Kendrick, LLP, Tampa; and R. Nathan Hightower of Nathan Hightower, P.A., Clearwater, for Appellees.

MORRIS, Chief Judge.

WLT Software Enterprises, Inc., through Shelley Van Etten (WLT/Van Etten),[1] appeals an order titled Order on Plaintiff's Amended Motion to Strike Limited Notice of Appearance and Notice of Voluntary

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[1] We refer to appellant as WLT/Van Etten when we refer to the actions of WLT through Van Etten in filing the lawsuit and this appeal.

Dismissal Without Prejudice, which operates as an order denying WLT/Van Etten's motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b). We affirm.

WLT/Van Etten filed a complaint against Charles Brooks, Ann Marie Brooks, and Thomas Brooks. The operative complaint stated that it was filed by "WLT SOFTWARE ENTERPRISES, INC., a Florida corporation, by and through SHELLEY VAN ETTEN, as Director and Co-President/CEO." The complaint alleged that Van Etten, Charles Brooks, and Thomas Brooks each hold a one-third share of WLT. The complaint also alleged that Charles Brooks is an officer, director, and employee of WLT and that Thomas Brooks was an employee of WLT before he was terminated. The complaint further asserted that Ann Marie Brooks was elected as a director at a shareholder meeting on May 21, 2020.[2] The complaint asserted counts for declaratory relief, breach of contract, breach of fiduciary duty, and unjust enrichment.

The Brookses filed a motion to dismiss in June 2020, arguing that the complaint failed to state a cause of action, failed to comply with conditions precedent, failed to name indispensable parties, failed to attach required exhibits, and failed to contain a proper verification. The trial court denied their motion to dismiss. The Brookses filed their answer and affirmative defenses, asserting in their fifteenth affirmative defense that the lawsuit should be dismissed because the directors and a

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[2] The original complaint was filed in April 2020 against Charles Brooks and Thomas Brooks, but the complaint was amended in September 2020 to add Ann Marie Brooks as a defendant after she was elected as a director to replace Thomas Brooks. At that same meeting, Charles Brooks and Van Etten were reelected as directors and the shareholders voted to dismiss the lawsuit filed by WLT/Van Etten. At a board of directors meeting on May 27, 2020, the directors also voted to dismiss the lawsuit, but WLT/Van Etten did not dismiss the lawsuit.

majority of the shareholders voted to dismiss the lawsuit and that Van Etten has a right to file a derivative action.

The case was referred to nonbinding arbitration in February 2021. After the arbitration award was entered in January 2022, the Brookses filed a timely motion for trial de novo. *See* Fla. R. Civ. P. 1.820(h). On June 15, 2022, the attorney for the Brookses, Nathan Hightower, filed a notice of appearance on behalf of WLT,[3] asserting that WLT had voted at its board of directors' meetings on May 27, 2020, and June 14, 2022, to dismiss the case. WLT/Brooks then filed a notice of voluntary dismissal "as directed by WLT's board of directors."

WLT/Van Etten filed a motion for relief from judgment under rule 1.540(b), seeking relief from the voluntary dismissal.[4] In the motion, WLT/Van Etten argued that the notice of voluntary dismissal was void because the shareholder and board action allegedly authorizing it was ultra vires and because it constitutes fraud, misrepresentation, and misconduct of an adverse party. The trial court denied the motion, concluding that WLT/Van Etten had not shown that it was adversely impacted by the voluntary dismissal because it did not specifically plead

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[3] We use the term WLT/Brooks to refer to the actions of WLT acting through the Brookses and attorney Hightower.

[4] The motion was titled "Plaintiff's Amended Motion to Strike Limited Notice of Appearance and Notice of Voluntary Dismissal Without Prejudice."

After WLT/Brooks filed the notice of voluntary dismissal, WLT/Van Etten filed a petition for writ of mandamus in this court, asking this court to order the trial court to conduct a trial de novo or to enter a judgment on the arbitration award under the arbitration rules. This court denied the petition without prejudice to any right WLT/Van Etten would have to file a rule 1.540(b) motion in the trial court seeking relief from the voluntary dismissal, citing *Pino v. Bank of New York*, 121 So. 3d 23 (Fla. 2013).

fraud on the court that was created by the voluntary dismissal. WLT/Van Etten now appeals.

Rule 1.540(b) provides that a trial court may grant relief from a final judgment for the following reasons:

> (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, decree, or order is void; or
> (5) that the judgment, decree, or order has been satisfied, released, or discharged, or a prior judgment, decree, or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment, decree, or order should have prospective application.

"[T]he grounds to seek relief from a final judgment or order under rule 1.540 are narrow [and] strictly limited to [the] enumerated list." *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1152 (Fla. 3d DCA 2013) (citing *Bank of Am., N.A. v. Lane*, 76 So. 3d 1007, 1008 (Fla. 1st DCA 2011)).

When a plaintiff files a voluntary dismissal, the defendant may seek relief in a rule 1.540(b) motion by proving fraud on the court and that the voluntary dismissal resulted in affirmative relief to the plaintiff which had an adverse impact on the defendant. *Pino v. Bank of New York*, 121 So. 3d 23, 26 (Fla. 2013) ("[W]hen a defendant alleges fraud on the court as a basis for seeking to set aside a plaintiff's voluntary dismissal, the trial court has jurisdiction to reinstate the dismissed action only when the fraud, if proven, resulted in the plaintiff securing affirmative relief to the detriment of the defendant and, upon obtaining that relief, voluntarily dismissing the case to prevent the trial court from undoing

the improperly obtained relief."). While *Pino* stands for the proposition that the trial court may grant relief from a voluntary dismissal under rule 1.540(b), it does not warrant relief here because WLT/Van Etten has not demonstrated fraud or any other ground for relief under rule 1.540(b).

WLT/Van Etten first presents three related arguments regarding the underlying nonbinding arbitration proceedings in the trial court. But because WLT/Van Etten is appealing a rule 1.540(b) order and the grounds for relief under that rule are limited, any arguments relating to the nonbinding arbitration rules are relevant only in the context of the grounds for relief under rule 1.540(b). WLT/Van Etten claims that WLT/Brooks committed fraud on the court because WLT/Brooks knew that an arbitrator had determined that the Brookses did not have authority to act on WLT's behalf, a fact which WLT/Van Etten contends that the Brookses concealed from the trial court. But the arbitrator's findings are nonbinding and have not been affirmed. *See generally* § 44.103, Fla. Stat. (2020); Fla. R. Civ. P. 1.820. In fact, where a motion for trial de novo is filed, the nonbinding arbitration decision "shall not be made known to the judge who may preside over the case." § 44.103(5). Thus, a trial judge should not be influenced by, or even aware of, the arbitration decision when a motion for trial de novo has been filed.

WLT/Van Etten also argues that the voluntary dismissal constitutes surprise under rule 1.540(b)(1), but WLT/Van Etten does not provide any authority that the facts of this case constitute surprise for purposes of rule 1.540(b). And it cannot be said that WLT/Van Etten was surprised that a notice of voluntary dismissal was filed when the directors had voted at two meetings to dismiss the lawsuit.

Further, WLT/Van Etten has not demonstrated fraud or misconduct by an adverse party because WLT/Van Etten has not set

forth any corporate law or authority demonstrating that Van Etten properly filed the lawsuit on WLT's behalf or that the Brookses could not act on WLT's behalf.[5] In addition, WLT/Van Etten has not shown that "it is no longer equitable that the [voluntary dismissal] should have prospective application" under rule 1.540(b)(5), as this ground has no application to the facts of this case. *See Castro v. Sun 'N Lake of Sebring Improvement Dist.*, 334 So. 3d 663, 666 (Fla. 2d DCA 2021) ("To qualify for relief under rule 1.540(b)(5), a movant must 'allege new circumstances affecting the decision made by the trial judge' and 'establish that these new circumstances make it no longer equitable for the trial court to enforce its earlier order.' 'At its core, there must be some new postjudgment fact or occurrence that requires the trial court, in equity, to recede from its prior order or judgment.' " (quoting *Bank of N.Y. Mellon v. Est. of Peterson*, 208 So. 3d 1218, 1223 (Fla. 2d DCA 2017))). Last, WLT/Van Etten has not shown that the voluntary dismissal is void under rule 1.540(b)(4). *See Tannenbaum v. Shea*, 133 So. 3d 1056, 1060-61 (Fla. 4th DCA 2014) (holding that "[a] void judgment is so defective that it is deemed never to have had legal force and effect" and is generally "one entered without subject matter

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[5] While the complaint alleged that Van Etten is co-president and CEO of WLT, she is only one of the directors and shareholders. *See Fla. State Oriental Med. Ass'n v. Slepin*, 971 So. 2d 141, 144 (Fla. 1st DCA 2007) ("A corporation is managed by its board of directors or by its officers acting under the direction and control of the board. This is generally true as a matter of corporation law throughout the United States, *see* Harry G. Henn and John R. Alexander, *Laws of Corporations*, §§ 203, 219 (1983), and it is true as a matter of Florida law as to both corporations for profit and not-for-profit. *See* § 607.0801 and 617.0801, Fla. Stat. (2007). The officers of a corporation are selected and removed by the directors."); *see also* § 607.0808, Fla. Stat. (2020) (providing that shareholders may remove directors and the procedure by which directors may be removed).

jurisdiction or personal jurisdiction" (first quoting *Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n*, 968 So. 2d 658, 665 (Fla. 2d DCA 2007); and then quoting *Zitani v. Reed*, 992 So. 2d 403, 409 (Fla. 2d DCA 2008)).

It appears that Van Etten's proper course of action was to file a shareholder's derivative action. "[I]t is for the directors to decide whether or not to litigate on behalf of the corporation . . . ." *Rappaport v. Scherr*, 322 So. 3d 138, 142 (Fla. 3d DCA 2021). When the directors of a corporation do not take the opportunity to act, a shareholder may file a derivative action. *See id.* (explaining derivative lawsuits and the necessary presuit demand). "A derivative suit is an action in which a [share]holder seeks to enforce a corporate right or to prevent or remedy a wrong to the corporation, where the corporation, because it is controlled by the wrongdoers or for other reasons, fails and refuses to take appropriate action for its own protection." *Strazzulla v. Riverside Banking Co.*, 175 So. 3d 879, 883 (Fla. 4th DCA 2015) (quoting *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 388 (Fla. 4th DCA 1999)). Based on the alleged conflict among the directors and shareholders in this case, Van Etten could have taken steps to bring a derivative action as a shareholder on behalf of WLT. *See, e.g.*, §§ 607.0741, .0742, Fla. Stat. (2020). WLT/Brooks could not have voluntarily dismissed a derivative lawsuit as they did this one. *Cf.* § 607.0744(1) (providing that a corporation may move to dismiss a derivative lawsuit when it can prove after a reasonable inquiry that a good faith determination has been made that the lawsuit is not in the best interests of the corporation).

Affirmed.

LaROSE and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.