IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR ST LUCIE COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 16-AP-30
Lower Tribunal No. 16-CC-901

THAJHA BISSIAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BARRY HIXON,

Appellant,

v.

ISLAND DUNES OCEANSIDE II CONDOMINIUM ASSOCIATION, INC.,

Appellee.
_____/

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

Decision filed December 19, 2017.

Appeal from the County Court for St. Lucie County; Nirlaine Smartt, Judge.

John Anastasio, Stuart, for appellant.

John Carrigan, Ross Earle Bonan & Ensor, P.A., Stuart, for appellee.

PER CURIAM.

On May 4, 2016, Island Dunes Oceanside II Condominium Association ("Association") filed a complaint for injunctive relief against the Appellant[1] for violations of the Amended and Restated Declaration of Condominium ("Declaration") based on cigarette smoke, animal urine, and an unauthorized pet. Personal service of the complaint was effected on the Appellant on May 6, 2016. When no responsive pleading was filed twenty days later, the Association obtained a clerk's default on May 27, 2016.

[1] Barry Hixon was the Appellant/defendant. However, he died on April 17, 2017, after all of the briefs were filed. On July, 11, 2017, his counsel filed a motion for substitution of party under Fla. R. App. P. 9.360(c)(3) to substitute his daughter as his personal representative under the terms of his will, and the appellate administrative judge signed an order granting the motion on August 1, 2017.

On May 31, 2016, five days after the clerk issued the default, the Appellant filed a pro se responsive pleading. The Association moved for summary judgment the same day. On June 7, 2016, the Appellant, through counsel, filed a motion to vacate default under Fla. R. Civ. P. 1.500(d), arguing that the pro se responsive pleading was received five days after the deadline and was therefore compliant under Fla. R. Jud. Admin. 2.514(b). After a hearing, the trial court entered an order on July 18, 2016 denying the motion to vacate default. On July 26, 2016, the Appellant filed a second motion to vacate default, this time arguing that he mistakenly believed he was allowed to mail in his answer; the Association later filed a response. After a hearing, the trial court entered an order denying the motion. The Association then motioned the trial court for a final judgment, and on October 18, 2016, it entered a final judgment enjoining the Appellant from further violating the Declaration. It also required the Appellant to take clean-up measures within fifteen days of the date of the order.

The Appellant argues that the trial court erred in denying his motions to vacate default. First, he argues that his responsive pleading was timely filed based on Fla. R. Jud. Admin. 2.514(b):

> When a party may or must act within a specified time after service and **service is made by mail or e-mail**, 5 days are added after the period that would otherwise expire under subdivision (a).

(Emphasis added). This was also his only argument in his first motion to vacate default. Unfortunately, the Appellant misses the mark with this argument, as he was served by a process server with the complaint, not by mail or e-mail. Therefore, he is not afforded relief under this rule.

The trial court denied the Appellant's second motion to vacate default and cited *Purcell v. Deli Man, Inc*., 411 So. 2d 378 (Fla. 4th DCA 1982) ("fundamental error in entertaining a second Rule 1.540(b) motion to set aside or vacate when the grounds in that second motion could have been raised in the first Rule 1.540(b) motion filed almost two years before the second motion."). The instant case is distinguishable from *Purcell*, in that *Purcell* involved a final judgment, and here, only the clerk had entered the default. Therefore, while the trial court did err in denying the second motion to vacate default by citing *Purcell*, the appellate court can affirm the decision under the tipsy coachman doctrine, which "allows an appellate court to affirm a decision despite a finding of error in the lower court's reasoning as long as there is an alternative basis to justify affirming the decision." *Malu v. Security Nat. Ins. Co*., 898 So. 2d 69, 73 (Fla. 2005). The Appellant's first

motion to vacate was based solely on Fla. R. Admin. 2.514(b), which, as discussed above, does not entitle him to relief. Why there are successive motions to vacate is unclear; the grounds in the second motion existed at the time of the filing of the attorney's first motion to vacate and could have easily been incorporated. It was not until the trial court denied the first motion to vacate that Appellant filed a second successive motion. The record is devoid of any granting by the trial court to file or amend the motion to vacate after the adjudication on the merits of the first.

Both parties filed motions for appellate attorney's fees. Appellate attorney's fees can be awarded if authorized by contract or statute. *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006). Pursuant to Fla. R. App. P. 9.400, a party must specify the statutory, contractual, or substantive basis for an award. *Id*. The Association's motion points to §718.303(1), which states in relevant part:

> Each unit…and each association, are governed by, and must comply with the provisions of this chapter [and] the governing documents creating the association…Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association…against…a unit owner…The prevailing party in any such action…is entitled to recover reasonable attorney's fees.

Also, the Association's motion points to Article XXIII, Section A, Subsection 3 of the Declaration, which states:

> In any proceeding arising because an alleged failure of a Unit Owner or the Association to comply with the requirements of the Condominium Act, this Declaration, the Exhibits annexed hereto, or policies and/or Rules and Regulations adopted pursuant to said documents, as the same may be amended from time to time, the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorneys fees (including appellate attorney fees).

Therefore, as prevailing party on appeal, the Association is awarded its appellate attorneys' fees. We remand to the trial court for a determination of amount.

Affirmed.

BUCHANAN, MCNICHOLAS, JJ., and ROBERTS, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.