IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ABDEL OSCAR DELGADO,

Appellant,

v. Case No. 5D19-1618

ARNEI MOREJON,

Appellee.

_____/

Opinion filed May 1, 2020

Appeal from the Circuit Court
for Orange County,
Diana M. Tennis, Judge,
Alan S. Apte, Judge.

Abdel Oscar Delgado, Orlando, Pro se.

Arnei Morejon, Orlando, Pro se.

PER CURIAM.

Abdel Oscar Delgado ("Former Husband") appeals the trial court's order granting attorney's fees to Arnei Morejon ("Former Wife"), and its order striking his amended supplemental petition for modification of child support and dismissing his supplemental petition that was seeking the same relief. For the reasons that follow, we dismiss Former Husband's appeal of the trial court's order dismissing the supplemental petition. Otherwise, we affirm.

This case involves three supplemental petitions to modify child support. The parties entered into a marital settlement agreement in 2016. One year later, Former Husband filed his first supplemental petition ("First Petition") to modify child support, alleging that he had involuntarily lost his second job. Following an evidentiary hearing on the petition, but before the trial court entered a written order, Former Husband filed his second supplemental petition ("Second Petition") to modify child support, alleging that Former Wife obtained employment. Former Husband then amended the Second Petition ("Amended Second Petition"), adding the allegation from his First Petition that his income decreased due to losing the job.

The day after Former Husband filed his Amended Second Petition, Former Wife answered his Second Petition. Thereafter, she answered his Amended Second Petition with allegations that mirrored her first answer.

The trial court denied Former Husband's First Petition, finding that he voluntarily quit his second job.[1] Former Wife then moved for attorney's fees on the basis of her need and Former Husband's ability to pay. At the evidentiary hearing, the trial court cautioned Former Husband that his conduct in the case was "getting vexatious."

Following oral rulings, but before the trial court entered a written order, Former Husband moved to disqualify the presiding judge. The trial court then entered an order granting Former Wife's motion for attorney's fees, noting Former Husband's pending motion to disqualify and specifying that it was conducting the "ministerial act of reducing to writing the orally pronounced ruling" from the attorney's fees hearing. The trial court

[1] This Court affirmed that judgment. *Delgado v. Morejon*, 266 So. 3d 1184 (Fla. 5th DCA 2019).

found that pursuant to *Levine v. Keaster*, 862 So. 2d 876 (Fla. 4th DCA 2003), Former Husband's conduct caused Former Wife to incur unnecessary attorney's fees, Former Wife had the need for such fees, and Former Husband had the ability to pay them.

The case was then transferred[2] to a new judge, who sua sponte struck Former Husband's Amended Second Petition on the basis that Former Wife had answered Former Husband's Second Petition. The trial court noted that "[the] Amended Supplemental Petition was not authorized by Court order allowing amendment." The trial court also sua sponte dismissed Former Husband's Second Petition because Former Husband failed to allege a change of circumstances since the trial on his initial petition.

On appeal, Former Husband argues that the trial court erroneously granted Former Wife attorney's fees pursuant to section 61.16(1), Florida Statutes (2018), because an attorney's fees request pursuant to a statute must be pled. He adds that the trial court's order granting attorney's fees failed to include findings of reasonable hours expended and hourly rate. Former Husband also argues that the trial court erroneously struck his Amended Second Petition and dismissed his Second Petition.

We affirm the trial court's order granting Former Wife attorney's fees. Although Former Wife's pro se answer did not include a request for attorney's fees, contrary to Former Husband's assertions, the attorney's fees order was not based on section 61.16(1). Rather, the trial court granted attorney's fees pursuant to *Levine*, 862 So. 2d at 880–81, which provides that attorney's fees may be awarded against a party to

[2] After the attorney fee order, the presiding judge ordered the Clerk of Court to reassign the case. *See* Fla. R. Jud. Admin. 2.330(j) (providing that if presiding judge does not rule on motion to disqualify within 30 days of service, "the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case"). A different trial judge was then assigned to the matter.

compensate for the unneeded attorney services caused by bad faith litigation. And, although the trial court's attorney fee order lacked findings as to the reasonableness of the hourly rate and hours expended, Former Husband did not raise this deficiency in a timely filed motion for rehearing. As such, any error is unpreserved for appellate review. *Spreng v. Spreng*, 162 So. 3d 168, 169 (Fla. 5th DCA 2015); *Mathieu v. Mathieu*, 877 So. 2d 740, 741 (Fla. 5th DCA 2004).

We similarly affirm the trial court's order sua sponte striking Former Husband's Amended Second Petition. Although the trial court struck the petition under the mistaken impression that Former Husband required leave of court to amend, and therefore the pleading was unauthorized, Former Husband again did not notify the trial court of the error via a motion for rehearing, nor did he challenge the adverse ruling in any way. *See State v. Barber*, 301 So. 2d 7, 9 (Fla. 1974) ("An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made.") (internal citations omitted)); *Verkruysse v. Fla. Carpenters Reg'l Council*, 27 So. 3d 157, 159 (Fla. 1st DCA 2010) (holding that appellant failed to preserve for appellate review her claim that JCC erred in dismissing her petition for benefits without considering certain pleadings, where error first appeared in JCC's final order, and appellant did not file motion for rehearing).

Finally, we dismiss Former Husband's appeal of the trial court's order sua sponte dismissing his Second Petition. The order did not indicate that it was with prejudice, and nothing on the face of the order prohibited Former Husband from filing an amended supplemental petition. *See Bouin v. Disabatino*, 250 So. 3d 168, 170 (Fla. 4th DCA 2018) ("[T]he failure to state a cause of action generally does not result in a dismissal with

prejudice.").[3] The order therefore lacks sufficient language of finality to constitute a final order and does not fit within the limited categories of appealable, nonfinal orders in Florida Rule of Appellate Procedure 9.130(a)(3). *See Hinote v. Ford Motor Co.*, 958 So. 2d 1009, 1011 (Fla. 1st DCA 2007) ("[W]here it remains unclear whether the order is intended to be final or nonfinal, it is proper to dismiss the appeal as premature because the order does not contain sufficient language of finality to constitute a final order." (citing *Bushweiler v. Levine*, 476 So. 2d 725 (Fla. 4th DCA 1985))). Accordingly, this Court does not have jurisdiction to review the trial court's order dismissing Former Husband's Second Petition.

AFFIRMED IN PART; DISMISSED IN PART.

GROSSHANS and SASSO, JJ., concur.
COHEN, J., concurs in part and dissents in part, with opinion.

[3] Further, nothing in the record indicates that the trial court intended for Former Husband to institute another action rather than to amend his petition. *Cf. Eagle v. Eagle*, 632 So. 2d 122, 122–23 (Fla. 1st DCA 1994) (holding that order dismissing plaintiff's action for child support, which stated in entirety, "[t]his case is dismissed without prejudice," was appealable final order, reasoning that record suggested trial court intended for plaintiff's action to be pursued in subsequent proceeding rather than in amended complaint).

COHEN, J., concurring in part and dissenting in part.

I am in agreement with the majority opinion except on one point. I do not believe that preservation of error concepts should require a motion for rehearing when a trial judge sua sponte strikes a complaint or petition.

It is fundamental that the sua sponte dismissal of pleadings without notice or the opportunity to be heard violates a party's due process rights. See, e.g., Lawson v. Frank, 197 So. 3d 1269, 1271 (Fla. 2d DCA 2016) (finding sua sponte dismissal of complaint violated due process when there was no hearing, objection, motion, or defense raised as to sufficiency of pleading); Manzano v. Nicoletti, 15 So. 3d 751, 752 (Fla. 3d DCA 2009) ("[W]here a trial court wishes sua sponte to raise the legal sufficiency of the complaint, the court must give the plaintiffs notice and a reasonable opportunity to respond." (citing Surat v. Nu-Med Pembroke, Inc., 632 So. 2d 1136, 1136–38 (Fla. 4th DCA 1994))).

While the trial court might well have been frustrated by Former Husband's repeated filings, the predecessor judge properly sanctioned Former Husband, awarding attorney's fees as a result of his vexatious litigation tactics. Former Wife had successfully defeated Former Husband's repeated attempts to avoid his financial obligations.

I would find that Former Husband preserved the issue for appeal by the timely filing of a notice of appeal and reverse the striking of the amended second petition. As the subsequent dismissal of Former Husband's second petition indicates, the trial court's true issue was not with the timeliness of Former Husband's amendment to his second petition, but rather, to the sufficiency of his pleading. That was an issue for the parties to litigate. See Lawson, 197 So. 3d at 1271; Sanchez v. LaSalle Bank Nat'l Ass'n, 44 So. 3d 227,

228 (Fla. 3d DCA 2010) (stating that striking of pleadings is not favored and trial court should not sua sponte strike pleading because it is legally insufficient or party may not be able to prove allegations).