

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

RAYMOND HENRY, JR.,
Appellant,

v.

RICHARD T. VICK,
Appellee.

UCN: 512019AP000019APAXWS
Case No.: 19-AP-19
L.T. No.: 19-CC-0067

_____/

On appeal from Pasco County Court,
Honorable Paul Firmani

Brendan R. Riley, Esq.,
Riley Law Group,
for Appellant.

Cristen Martinez Weiner, Esq.,
Martinez Law, P.A.,
for Appellee.

ORDER AND OPINION

Appellant argues that the trial court erred in granting Appellee's Motion for Immediate Final Default Judgment for Count I (Eviction – Commercial Lease) and Count II (Eviction – Residential Lease) of Appellee's Complaint. For the reasons detailed below, the Court holds that the trial court erred in granting Appellee's motion as to both counts. However, the error as to Count II was harmless. Therefore, the trial court's order is reversed in part and affirmed in part.

STATEMENT OF THE CASE AND FACTS

Appellee leased two buildings, Building "B" and a portion of Building "C" to Appellant. Both buildings are located at the same address. The parties entered into a residential lease agreement for the second floor of Building "B" and a commercial lease agreement for the remainder of Building "B" and the portion of Building "C." The lease

term for both leases ended on November 30, 2018. Appellant did not vacate the premises at the end of the lease.

Appellee filed a three-count Complaint. Count I of the Complaint sought eviction as to the commercial lease. Count II sought eviction as to the residential lease. Count III, which is not at issue in this appeal, sought breach of contract damages for non-payment of rent as a holdover tenant. The following timeline of events then occurred:

- January 18, 2019 – initial process was served on Appellant
- January 25, 2019 – five days after service of process¹
- January 28, 2019 – Appellant filed Motion for Extension of Time to Respond to Complaint seeking a ten day extension of time to respond to the Complaint. The motion was never set for hearing and no order on the motion was issued.
- January 29, 2019 – Appellee filed a Motion for Immediate Final Default Judgment as to Count I only, the eviction count for the commercial lease. The motion cited section 83.60(2), Florida Statutes, and argued that Appellant had failed to respond to the Complaint or pay rent into the court registry within five days of service of process.
- February 1, 2019 – Appellant filed two documents: (1) Answer, Affirmative Defenses, Counterclaim for a violation of Florida Consumer Collection Practices Act, and Motion to Determine Rent; and (2) an objection to the Motion for Immediate Final Default Judgment.
- February 18, 2019 – Hearing on Appellee's Motion for Immediate Final Default Judgment held.

Appellant's objection asserted that Appellant had timely-filed a motion for extension of time to respond to the complaint. It further argued that default final judgment was inappropriate because the basis for the motion for default was failure to either pay rent into the court registry or file a motion to determine rent within 5 days after service of process pursuant to section 83.60, Florida Statutes. However, Appellant continued, that

¹ Process was served on Friday, January 18, 2019. The first day in a period of time begins counting on the next day that is not a Saturday or Sunday. Fla. R. Jud. Adm. 2.514(a)(1). Thus, the first day of the 5 day periods in Florida Statute sections 51.011(1) (summary procedure) and 83.60(2) (payment of rent into court registry or motion to determine rent in residential leases), was Monday, January 21, 2019.

statute applies to residential leases only and the motion for default sought default for the commercial lease only.

Appellant noted that in commercial leases, section 83.232, Florida Statutes, states that "if the tenant contests the amount of accrued rent, the tenant must pay the amount determined by the court into the court registry on the day that the court makes its determination."

The default motion was heard by the trial court. However, the hearing was not transcribed. The trial court issued an order granting the default judgment. The trial court wrote the following:

The Plaintiff is requesting that a default be entered against the Defendant for failing to timely file an answer and more importantly for failing to post any monies into the rent registry of the Clerk of the Court in a timely fashion.

A review of the file will show that a complaint for eviction and damages was filed on January 4th, 2019. The Defendant was served on January 18th, 2019. A response therefore would have been due no later than January 25th, 2019. The Defendant filed a motion for extension of time on January 28th, 2019 but obtained no Court ruling granting said extension request.

The Plaintiff then filed a motion for default on January 29th, 2019 and the Defendant filed his answer, affirmative defenses and counterclaim on February 1, 2019. Funds in the amount of \$5,400.00 were not posted into the registry until February 8, 2019 according to the Clerk's rent registry records.

The Court finds that the Plaintiff's argument is well taken. It is therefore

ORDERED AND ADJUDGED that the Plaintiff's Request for a Default is therefore granted as to Count I for Eviction regarding a commercial lease and also as to Count II for Eviction as regards to a residential lease. The Court finds that the Defendant's Request for a Rent Hearing has been rendered moot by the entry of a default and therefore no ruling will be made at this time.

The trial court also issued a Final Judgment and a Writ of Possession. Appellant filed a motion for rehearing again raising the inapplicability of section 83.60 and its five-day response requirement. The trial court denied the motion. Appellant timely appeals.

STANDARD OF REVIEW

Where no transcript of a proceeding is made, an appellate court cannot reverse unless there is an error on the face of the trial court's order. Additionally, the error complained of must be a harmful error resulting in a miscarriage of justice. *Harris v. McKinney*, 20 So. 3d 400, 405-06 (Fla. 2d DCA 2009) (citations and quotations omitted).

LAW AND ANALYSIS

Generally, a trial court's decisions come to this Court with a presumption of correctness. Thus, this Court must presume that the trial court's findings are correct unless Appellant can demonstrate that a reversible error was made. *Hirsch v. Hirsch*, 642 So. 2d 20 (Fla. 5th DCA 1994); *Casella v. Casella*, 569 So. 2d 848 (Fla. 4th DCA 1990). Significantly, neither party provided a transcript of the hearing on Appellee's Motion for Immediate Final Default Judgment. And a hearing was not held on Appellant's motion for rehearing.

Therefore, this Court can only reverse the trial court if there is an error apparent on the face of the trial court's orders granting Appellee's motion and denying Appellant's motion. Additionally, the error complained of has to constitute a harmful error that resulted in a miscarriage of justice. *Harris*, 20 So. 3d at 405-06 (citations and quotations omitted).

A. Count I – Eviction (Commercial Lease)

The trial court's order provided two bases for granting Appellee's motion: (1) failure to file an answer to the Complaint within 5 days of service of process pursuant to sections 83.21 and 53.011(1), Florida Statutes (2018), and (2) failure to pay rent into the court registry within 5 days of service of process pursuant to section 83.60(2), Florida Statutes (2018). However, neither basis supports default judgment as to Count I.

1. Failure to File Answer within 5 Days

Summary procedure applies to commercial tenancies. See §§ 83.21 (providing that the landlord of a nonresidential property is "entitled to the summary procedure provided in s. 51.011"); 51.011(1) (providing that an answer to a complaint must be filed within 5 days after service of process), Fla. Stat. (2018). However, Florida Rule of Civil

Procedure 1.500(c) applies to section 51.011 summary procedure. *Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1258-59 (Fla. 2008). Florida Rule of Civil Procedure 1.500(c) provides that if a default judgment has not yet been issued, the filing of a responsive pleading precludes the issuance of a default judgment, regardless of the timeliness of the responsive pleading; *Id.* at 1258-59.

In the case at bar, Appellant filed his Answer, Affirmative Defenses, Counterclaim for a violation of Florida Consumer Collection Practices Act, and Motion to Determine Rent² prior to the hearing on Appellee's Motion for Default Final Judgment and the subsequently issued trial court order. Therefore, Florida Statute sections 83.21 and 51.011 do not support a default judgment for Count I even though Appellant filed his pleadings after the 5 days required by section 51.011(1).

2. Failure to Pay Rent into the Court Registry

Section 83.60(2), Florida Statutes (2018), requires that within 5 days of service of process, a tenant must either move to determine rent or pay rent into the court registry. The failure to do so results in a landlord's right to an immediate default judgment and writ of possession. § 83.60(2), Fla. Stat. (2018). However, section 83.60 only applies to residential tenancies. In a nonresidential tenancy, failure to pay rent into the court registry results in an immediate default judgment and writ of possession only if and after the trial court issues an order directing the tenant to pay rent into the court registry. See §83.232(1), Fla. Stat. (2018).

In the case at bar, section 83.60(2) was not applicable to Count I because the lease in question was commercial and therefore nonresidential. With regard to the similar provision for nonresidential leases under section 83.232(1), the trial court did not issue an order directing Appellant to pay rent into the court registry on the commercial lease. Therefore, default judgment for Count I for failure to pay rent into the court registry was improper and Appellee was not entitled to immediate default judgment and possession.

Additionally, because no order to pay rent into the court registry has been issued and Appellant has filed a motion to determine rent, the trial court must now determine the amount of rent due under the commercial lease before issuing an order to pay rent into the court registry. See § 83.232(1), Fla. Stat. (2018) ("If the tenant contests the amount

² While a motion to determine rent is not a pleading, it was included in the filed document that contained pleadings.

of accrued rent, the tenant must pay the amount determined by the court into the court registry on the day that the court makes its determination”).

3. Harmless Error Analysis

Based upon the procedural posture of this case and the relevant sections of Chapter 83, Part I, it is still possible to reach the merits of Appellant's defenses, counterclaim, and motion to determine rent. Therefore, the trial court's error in issuing the Default and Final Judgments as to Count I was not harmless. The trial court's order must be reversed as to Count I – Eviction (Commercial Lease).

B. Count II – Eviction (Residential Lease)

If a ground is not raised in a written motion, but the trial court hears the ground during the motion hearing and issues an order ruling on that ground, a due process violation occurs because the nonmoving party has no notice and opportunity to be properly heard. See *Busch v. Busch*, 762 So. 2d 1010, 1010-11 (Fla. 2d DCA 2000). However, due process violations in civil cases are subject to harmless error analysis. See *Gonzalez v. Dep't of Health*, 120 So. 3d 234, 237 (Fla. 1st DCA 2013) (“This court applies the harmless error test used in civil cases for violations of due process rights to a fair hearing”).

1. Appellee did not Move for Default Final Judgment for Count II

In the case at bar, Appellee only moved for a final default judgment as to Count I, the eviction count for the commercial lease. Therefore, it was error for the trial court to issue default and final judgments for Count II. While it is possible to try an issue by consent where the nonmoving party fails to object, no transcript of the proceeding was made and the trial court's order makes no reference to whether Appellant objected to the trial court hearing Appellee's motion as to Count II.

2. Harmless Error Analysis

The above being said, the error as to Count II was harmless. While section 83.60(2) does not apply to Count I, it does apply to Count II. And the record is undisputed that Appellant failed to move to determine the residential rent or pay residential rent into the court registry within 5 days of service of process. There is no point in reversing the trial court's order on Count II because on remand, Appellee will be entitled to immediate default judgment for eviction and writ of possession which is the result that has already

been reached. See *Stanley v. Quest Int'l Inv., Inc.*, 50 So. 3d 672, 672-74 (Fla. 4th DCA 2010). Therefore, the trial court's order as to Count II – Eviction (Residential Lease) is affirmed.

CONCLUSION

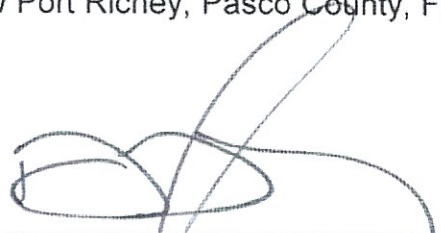
Because the trial court committed harmful error as to Count I, the trial court's default and final judgments as to Count I and the order issuing the writ of possession for the commercial property are reversed. Because the trial court's error as to Count II was harmless, the trial court's default and final judgments as to Count II and the order issuing the writ of possession for the residential property are affirmed. The case is remanded for proceedings consistent with this Court's Opinion.

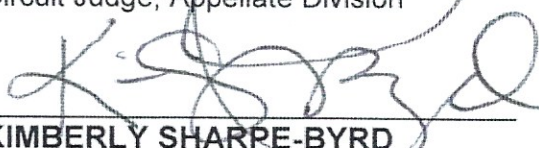
It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby REVERSED in part and AFFIRMED in part, and the case REMANDED for proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 18 day of November, 2019.



SUSAN G. BARTHLE
Circuit Judge, Appellate Division



DANIEL D. DISKEY
Circuit Judge, Appellate Division


KIMBERLY SHARPE-BYRD
Circuit Judge, Appellate Division

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