

**NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

DEBRA YORK,
Appellant,
v.

Ref. No.: 15-000033-AP-88B
UCN: 522015AP000033XXXXCI

PAUL DEL MONTE,
Appellee.

ORDER AND OPINION

Appellant appeals three county court orders in a landlord-tenant eviction action: (1) an order of default entered against Appellant for failure to file an answer; (2) an order denying Appellant's emergency motion to set aside the default; and (3) an order denying Appellant's request for a stay of writ of possession. On appeal, Appellant contends that the county court wrongly entered the Order of Default and all subsequent orders. For the reasons set forth below, the Order of Default is reversed and, accordingly, the other orders are rendered moot.

Facts and Procedural History

Landlord Appellee Del Monte filed a complaint to evict Tenant Appellant York for nonpayment of rent. Appellant timely filed a motion to determine rent. Appellant did not file a separate, independent answer. Appellee filed a motion to default Appellant for not paying rent into the court registry pursuant to section 83.60(2), Florida Statutes. The court ordered that Appellant pay \$5,005.00 into the registry; Appellant timely complied and filed counterclaims. Subsequently, the court entered default judgment against Appellant for not filing an answer, which was a ground for default judgment that had not previously been raised. The default applied only to Appellee's possession claim, not the damages claim or counterclaims. Appellant filed an emergency motion to set aside the default, alleging that the motion to determine rent constituted an answer. Simultaneously, Appellant filed a new pleading titled "Answer." The court denied this emergency motion and granted Appellee a writ of possession. Appellant then filed an emergency motion to stay the writ, which the court also denied. This appeal of all three orders ensued.

Standard of Review

A trial court's legal findings are reviewed *de novo*. *Klinow v. Island Court at Boca W. Prop. Owners' Ass'n, Inc.*, 64 So. 3d 177, 180 (Fla. 4th DCA 2011); *Hendrix v. Dep't Stores Nat. Bank*, 40 Fla. L. Weekly D2215f (Fla. 4th DCA Sept. 30, 2015) ("Whether a judgment is void is a question of law reviewed *de novo*.").

Discussion

On appeal, Appellant raises various legal arguments as to why the court wrongly entered the Order of Default, including the contentions that her timely filed motion to determine rent also constituted her answer and that she was entitled to a hearing on her motion before default was entered. However, this Court need not address Appellant's assorted arguments because the Order of Default is void for violating Appellant's due process rights. Even though Appellant did not raise this issue on appeal, the Court may consider it because deprivation of due process rights is fundamental error. *Verizon Bus. Network Servs., Inc. ex rel. MCI Commc'ns, Inc. v. Dep't of Corr.*, 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008); *Withers*, 41 So. 3d at 401. The lower court violated Appellant's due process rights by entering default judgment against her under Rule 1.500 since it did not provide Appellant with both notice and an opportunity for hearing. The appellate court "may consider and rule upon a constitutional or fundamental error when first raised or revealed on the record on appeal." *Marks v. Delcastillo*, 386 So. 2d 1259, 1268 (Fla. 3d DCA 1980); *see Withers v. Blomberg*, 41 So. 3d 398, 401 (Fla. 2d DCA 2010); *see also Verizon Bus. Network Servs., Inc. ex rel. MCI Commc'ns, Inc.*, 988 So. 2d at 1151 ("A denial of due process, if proven, constitutes fundamental error, which may be challenged for the first time on appeal.").

In a possession action based on nonpayment of rent, if the tenant does not pay rent into the registry or file a motion to determine rent to be paid within five days after service of process, then "the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon." *Id.* That is, instantaneous default may occur only when the tenant does not pay rent into the registry or file a motion to determine rent. *See Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1258 (Fla. 2008). Here, Appellant timely filed a motion to determine rent and complied with the court's order to deposit rent into the registry, so entry of default judgment under section 83.60(2), Florida Statutes, was precluded. Thereafter, the court entered default judgment against

Appellant pursuant to Florida Rule of Civil Procedure 1.500 for Appellant's failure to file an answer. Under either section 83.60(2), Florida Statutes, or Rule 1.500(b), a party that files any papers in an action prior to default judgment is entitled to notice of an application for default. *Geraci v. Preferred Capital Markets, Inc.*, 802 So. 2d 479, 482 (Fla. 3d DCA 2001). Under Rule 1.500(b), but not section 83.60(2), Florida Statutes, a hearing is also required. *Hendrix*, 40 Fla. L. Weekly D2215f. Failure to give adequate notice and an opportunity to be heard deprives a party of due process; default judgments that deprive due process are void. *Id.*; *Zeigler v. Huston*, 626 So. 2d 1046, 1048 (Fla. 4th DCA 1993). Appellant received notice of Appellee's application for default based on her failure to pay rent into the registry; she did not receive notice of an application for default based on her alleged failure to file an answer, nor an opportunity to be heard. *See id.* Therefore, the court's entry of default judgment against Appellant pursuant to Rule 1.500 violated her due process rights and the Order of Default is void.

Conclusion

The lower court erred in entering an Order of Default against Appellant because she was deprived of due process, which is a fundamental error. Since the Order of Default is void, the Court need not address the two subsequently entered orders.

Accordingly, it is,

ORDERED AND ADJUDGED that the Order of Default is **REVERSED** and the case is **REMANDED** for further proceedings.

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida on this 3RD day of December, 2015.

Original Order entered on December 3, 2015, by Circuit Judges Jack Day, Amy M. Williams, and Thomas M. Ramsberger.

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