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

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

ROBERT A. MONTEIRO,
Appellant,

v.

Ref. No.: 15-000081AP-88B
UCN: 522015AP000081XXXXCI

LISA A. PRIMER,
Appellee.
_____/

ORDER AND OPINION

Robert A. Monteiro appeals the lower court's November 19, 2015 Final Judgment holding him in breach of his contractual obligations under a stipulated settlement agreement entered by the parties in the underlying proceeding. First, Appellant contends that he was not provided with notice and hearing before the Final Judgment was entered and therefore was denied due process of law. Second, he contends that his default, due to a good faith mistake, does not constitute a material breach of the stipulated agreement, because the language of the agreement does not expressly include a "time is of the essence" clause. For the reasons set forth below, the lower court's Final Judgment is affirmed.

Facts and Procedural History

On March 19, 2015, Robert A. Monteiro, Appellant, and Lisa A. Primer, Appellee, entered into a stipulation for settlement as part of a small claims proceeding initiated by Appellee against Appellant for the re-payment of a $5000.00 loan. In the settlement agreement, Appellant agreed to pay a total of $2,800.00 in monthly installments as satisfaction of the debt. However, the agreement provided that "upon Defendant's default of the terms of [the] Stipulation, a Final Judgment be entered in favor of the Plaintiff in the amount of $5000.00 (minus payments made) upon the filing of a sworn statement with the Court reciting the balance claimed due." Based on this stipulation between the parties, the lower court stayed final judgment pending Appellant's compliance with the settlement.

On November 9, 2015, Appellee filed a letter with the lower court stating that Appellant had breached his obligations under the settlement agreement, and requesting entry of a final

judgment in the amount of $5000.00 minus the amounts already paid. Pursuant to the settlement agreement, the lower court entered a final judgment against Appellant for $2500.00, plus interest. This Final Judgment is the subject of the instant appeal.

Standard of Review

A decision of a lower court comes to the appellate court under "the presumption of correctness." *United American Lien and Recovery Corp. v. Primicerio,* 924 So. 2d 848, 853 (Fla. 4th DCA 2006). However, in resolving a dispute arising out of a question of law, such as the interpretation of the terms of a statute or the provisions in a contract, this Court must review the lower court's decision under a *de novo* standard of review. *See State v. Burris,* 875 So. 2d 408, 410 (Fla. 2004); *On Target, Inc. v. Allstate Floridian Ins. Co.*, 23 So. 3d 180, 182 (Fla. 2d DCA 2009).

Discussion

Appellant contends that he was deprived of his due process rights because the Final Judgment was entered against him without notice and opportunity for hearing. However, the plain language of both the Florida Small Claims Rules and the settlement agreement provide for entry of a final judgment without notice or hearing upon Appellant's failure to comply with the terms of the agreement. The Florida Small Claims Rules encourage parties to enter into settlements. Fla. Sm. Cl. R. 7.130(b). The Rules vest county courts with the discretionary power to stay entry of a final judgment, or the execution of such judgment, in consideration of a debtor's stipulation to make periodic payments. Fla. Sm. Cl. R. 7.210(a). The Small Claims Rules also establish that if a debtor fails to "perform the terms of [the] stipulation or agreement for settlement of the claim before judgment, the court may enter appropriate judgment without notice upon the creditor's filing of an affidavit of the amount due." Fla. Sm. Cl. R. 7.130(b). Here, Appellant and Appellee entered into a stipulated settlement agreement, but Appellant failed to make the final required payment. Therefore, under the Small Claim Rules governing this proceeding, Appellant is not entitled to notice of default or hearing before the court enters a final judgment against him.

Furthermore, nothing in the parties' settlement provides for notice before a final judgment is entered. On the contrary, the terms of the agreement unequivocally establish that "upon [Appellant's] default of the terms of this Stipulation, a Final Judgment [shall] be entered in favor of the [Appellee] in the amount of $5000.00 (minus payments made)." Courts have

regularly enforced this type of language, to allow automatic entry of a final judgment upon the filing of affidavit for amount due. *Cf. Unifund CCR Partners v. Babcock*, 17 Fla. L. Weekly Supp. 617a (Fla. 15th Cir. Ct. Apr. 15, 2010) ("[I]f [a] judgment debtor fails to pay the installment payments, the judgment creditor may have execution without further notice for the unpaid amount of the judgment upon filing an affidavit of the amount due."). Thus, neither the Small Claim Rules, nor the language of the settlement agreement, provides Appellant with opportunity for notice or hearing before entry of a final judgment once he has failed to make the required payments, and Appellee has filed a letter for amount due.[1] Therefore, the lower court properly observed Appellant's due process rights.

Next, Appellant contends that his default was not a material breach of the settlement agreement because there was no time clause. The parties to a settlement agreement "have a broad discretion in fashioning the terms of [the] agreement." *Aboumahboub v. Honing*, 182 So. 3d 682, 684 (Fla. 4th DCA 2015). They may incorporate a clause establishing that "time is of the essence," such that a delay in the performance of obligations shall constitute a material breach. *Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470, 471 (Fla. 4th DCA 2003). However, an express "time is of the essence" clause is not necessary to make timely performance essential. *Id.* at 471.

Moreover, terms stipulated by the parties that are clear and unambiguous may not be modified by court interpretation. *Treasure Coast, Inc. v. Ludlum Construction Co.*, 760 So. 2d 232, 234 (Fla. 4th DCA 2000). A court may not impose its own remedy over that clearly established by the parties to a settlement agreement. *Id.* Although the settlement agreement in this case does not specifically provide a "time is of the essence" clause, its language is clear and unambiguous with respect to when payment was due and the consequences of failing to comply with those terms. Appellant's claim of error made in good faith does not release him from his

[1] The Court notes that while Florida Small Claims Rule 7.310 requires an affidavit, and the Stipulation requires a "sworn statement" as a condition precedent to entry of a final judgment, Appellee, acting in a *pro se* capacity, sent only an unsworn letter, which the trial court treated as an affidavit. Although this letter "is insufficient to constitute an affidavit under Florida Law," *Orbe v. Orbe,* 651 So. 2d 1295, 1296 (Fla. 5th DCA 1995), this issue was not raised on appeal, therefore, this Court cannot consider it. *Allstate Ins. Co. v. Gillespie*, 455 So. 2d 617, 620 (Fla. 2d DCA 1984). Moreover, Appellee's use of an unsworn letter instead of an affidavit, in this case, is not fundamental error because it does not affect the "merits of [her] cause of action." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970).

contractual obligations. Appellant missed a payment, so under the "clear and unambiguous" language of the agreement, Appellee was entitled to entry of judgment in her favor.

Conclusion

Neither the Florida Small Claim Rules nor the language of the settlement agreement required the court to give Appellant notice or a hearing. Appellant's failure to pay the amount due according to the terms of the agreement constitutes a material breach of the contract.

Accordingly, it is,

ORDERED AND ADJUDGED that the lower court's Final Judgment is **AFFIRMED.**

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida on this 8 day of August 2016.

Original Order entered on August 8, 2016, by Circuit Judges Jack Day, Pamela A.M. Campbell, and Thomas M. Ramsberger.

Copies furnished to:

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