

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**

MARY ELLEN SHEA,
Appellant,

v.

UCN: 512017AP000021APAXWS
Appeal No.: 17-AP-21
L.T. No.: 15-CC-1769

**ANCLOTE ACRES LLC, D/B/A ANCLOTE
ACRES MOBILE HOME PARK,**
Appellee.

_____/

On appeal from Pasco County Court,
Honorable Anne Wansboro

John A. Shahan, Esq.,
for Appellant,

Lauriane Ciccarelli, Esq.,
for Appellee.

ORDER AND OPINION

Appellant's Notice of Appeal seeks reversal of the trial court's default and final judgments for damages (Count II of Appellee's Second Amended Complaint) on standing, jurisdictional, and evidentiary grounds. Appellant's Initial Brief additionally seeks reversal of the trial court's order foreclosing on a judgment lien. For the reasons detailed below, the default and final judgments as to Count II must be reversed but the order foreclosing on a judgment lien must be affirmed.

FACTUAL BACKGROUND

On December 1, 2015, Plaintiff-Appellee Anclothe Acres, LLC, filed its Second Amended Complaint for Eviction (Count I)¹ and Damages for unpaid rent (Count II). On December 22, 2015, Appellee filed a Motion for Judicial Default alleging that Defendant-Appellant Mary Ellen Shea had failed to respond to the Second Amended Complaint and had failed to pay rent into the court registry. On January 6, 2016, Appellant filed a Motion

¹ The trial court's default and final judgments for Count I were previously affirmed by this Court. See case number 16-AP-4

to Dismiss the Second Amended Complaint, alleging that Appellee did not have standing to bring suit. The motion to dismiss was never set for a hearing by either party.

On February 15, 2016, the trial court ordered Appellant to pay \$4,776.00 into the court registry by 2:00 p.m. that day. Appellant did not pay the required amount into the court registry until February 19, 2016. On April 25, 2017, a hearing was held on Count II. On May 3, 2017, the trial court issued an Order on Judicial Default for Count II Damages and a Final Judgment for Count II Damages. The final judgment ordered Appellant to pay \$20,477.00 in damages to Appellee and imposed a lien against Appellant's mobile home in that amount.

On May 3, 2017, Appellant filed a Motion to Vacate the default and final judgments on the ground that Appellant was unrepresented by her counsel at the April 25, 2017 hearing because counsel had inadvertently slept through the time for the hearing due to complications and side effects from medical issues.

On May 19, 2017, Appellee filed a Motion to Foreclose on Lien. On May 30, 2017 at 12:36 p.m., Appellant timely-filed the Notice of Appeal in the instant case. At 3:30 p.m. that same day, the trial court filed with the Clerk an order granting Appellee's motion and issued an Order Foreclosing Lien.

On December 7, 2017, this Court relinquished jurisdiction to the trial court to issue a written order ruling on the Defendant's Motion to Vacate. That same day, the trial court issued an order denying the motion. Appellant did not file any supplemental pleadings or briefs after the trial court issued its written order denying the Motion to Vacate.

LAW AND ANALYSIS

Appellant argues that (1) the trial court erred in setting a hearing on, and entering a final judgment for, Count II because issues of jurisdiction and standing were still pending pursuant to Appellant's Motion to Dismiss; (2) the trial court was without personal jurisdiction over Appellant to address Count II because of defects in service of process;² (3) the trial court erred in awarding a specific damage amount because the amount of lot rent due was a contested issue; (4) the trial court erred in awarding an amount of damages that was not supported by competent, substantial evidence; and (5) the trial

² Appellant improperly presents this claim for the first time on appeal. See *Little Beaver Theater, Inc. v. State*, 259 So. 2d 217, 218 (Fla. 3d DCA 1972).

court erred in granting Appellee's motion to foreclose on the lien during the pendency of the instant appeal.

Default and Final Judgments

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, what is missing from the appellate record is a transcript of the April 25, 2017 hearing or any record that would substantiate Appellant's claims. However, there appears to be an error on the face of the default judgment.

The Order on Judicial Default for Count II Damages states that "[t]he Court finds Defendant, Mary Ellen Shea is in default. The Defendant, Mary Ellen Shea . . . has failed to deposit the rent into the registry of the court."

Failure to pay into the court registry is addressed in section 83.60, Florida Statutes (2015), which provides in relevant part:

In an action by the landlord for possession of a dwelling unit, if the tenant interposes any defense other than payment . . . the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent that accrues during the pendency of the proceeding, when due . . . Failure of the tenant to pay the rent into the registry of the court. . . within 5 days . . . after the date of service of process constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to an immediate default judgment for removal of the tenant.

§ 83.60(2), Fla. Stat. (2015) (emphases added); *see also Freedman v. Geiger*, 314 So. 2d 189 (Fla. 3d DCA 1975):

Although the Geigers' complaint contains, inter alia, a demand for possession, it also seeks other relief from Freedman . . . This cause, then, is not an action solely for possession in which the statute could be applied to afford complete and appropriate relief.

Id. at 190. The default judgment as to the damages count was in error because the statute provides that failure to pay rent into the court registry may only result in a default for the possession count, not the damages count.

Having determined that the default judgment contains an error on its face, the Court must determine whether the error was fundamental. *See Marks v. Delcastillo*, 386

So. 2d 1259, 1268 (Fla. 3d DCA 1980) (providing that an appellate court “may consider and rule upon a . . . fundamental error when first . . . revealed on the record on appeal”); *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) (“A denial of due process, if proven, constitutes fundamental error, which may be challenged for the first time on appeal”).

For an error to be fundamental, it must go to the foundation of the case or the merits of the case and must amount to a denial of due process. *Hooters of Am. v. Carolina Wings*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995) (citing *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970); *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981)). The Court holds that the error in this case was fundamental.

Appellee raised two grounds in its Motion for Judicial Default: (1) that Appellant had failed to respond to the Second Amended Complaint, and (2) that Appellant had failed to pay into the court registry. The award of \$20,477.00 resulted directly from the trial court’s default judgment for failure to pay into the court registry. Had the trial court not erred, it would have been required to determine whether Appellee was entitled to a default judgment solely on the basis of whether Appellant had responded to the Second Amended Complaint.

Before the trial court entered its default judgment as to Count II, Appellant had filed a Motion to Dismiss the Second Amended Complaint. In that motion, Appellant alleged that Appellee lacked standing to sue. Thus, Appellant raised the defense of standing. See *Maynard v. Fla. Bd. of Educ.*, 998 So. 2d 1201, 1206 (Fla. 2d DCA 2009) (holding that a challenge to standing may be raised in the trial court either by affirmative defense or by motion).

Because the statutory requirement to pay into the court registry only applies to an action for possession, Appellant’s failure to pay into the court registry only waived Appellant’s standing defense as to Count I. § 83.60(2), Fla. Stat. (2015) (“In an action . . . for possession . . . Failure of the tenant to pay into the registry . . . constitutes an absolute waiver of the tenant’s defenses”). Failure to pay into the court registry did not waive the standing defense as to Count II.³ Thus, awarding \$20,477.00 in damages to Appellee

³ Appellee argues in its Answer Brief that the trial court had resolved the standing issue raised in Appellant’s Motion to Dismiss. However, the record on appeal does not contain a written order or ruling denying

without first addressing Appellant's motion to dismiss for lack of standing, based upon an improper default judgment, served to deprive Appellant of due process. Therefore, the error was fundamental.

For the aforementioned reasons, this Court must reverse the Order on Default Judgment for Count II Damages and the Final Judgment for Count II Damages. Nothing in this opinion shall be construed as ruling, addressing, or commenting on the merits or likelihood of success of Appellant's Motion to Dismiss the Second Amended Complaint as to Count II or the portion of Appellee's Motion for Judicial Default alleging that Appellant failed to respond to the Second Amended Complaint. Those determinations are for the trial court to make.

Order Foreclosing Lien

Appellant's Notice of Appeal sought review of the trial court's default and final judgments. Appellant filed his Notice of Appeal prior to the trial court issuing its Order Foreclosing Lien. After the trial court issued its Order Foreclosing Lien, Appellant did not file an amended Notice of Appeal seeking review of that order. Thus, the Order Foreclosing Lien was not properly raised before this Court and the order must be affirmed. However, even if properly raised, Appellant would not be entitled to relief.

The order enforcing lien was issued to enforce a money judgment for Count II Damages. Even where a notice of appeal is filed, a trial court has concurrent jurisdiction to enforce a final judgment. *Mann-Stack v. Homeside Lending, Inc.*, 982 So. 2d 72, 73-74 (Fla. 2d DCA 2008). Thus, to prevent enforcement, a party must file a motion to stay pending review with the trial court. Fla. R. App. P. 9.310(a). A stay pending review may be entered without need of filing a motion where the judgment is solely for the payment of money. However, the party seeking the stay must post "a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest." Fla. R. App. P. 9.310(b)(1).

In the case below, the Order Foreclosing Lien was an order enforcing the final judgment for money damages. The trial court had concurrent jurisdiction to issue the

Appellant's Motion to Dismiss the Second Amended Complaint or finding that Appellee had standing after the Second Amended Complaint was filed.

order and the record on appeal does not reflect that Appellant posted a bond or filed a motion to stay pending review in the trial court. Thus, the order was properly issued.

CONCLUSION

The default judgment as to Count II contains a fundamental error on its face. Accordingly, we reverse the Order on Judicial Default for Count II Damages and the Final Judgment for Count II Damages. Appellant did not properly seek review of the Order Foreclosing Lien before this Court. Accordingly, the Order Foreclosing Lien is affirmed.

It is ORDERED AND ADJUDGED that the trial court's Order on Judicial Default for Count II Damages and Final Judgment for Count II Damages are hereby REVERSED AND REMANDED for further proceedings consistent with this Opinion.

It is FURTHER ORDERED AND ADJUDGED that the trial court's Order Foreclosing Lien is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ____ day of _____, 2018.

Original Order entered on May 7, 2018, by Circuit Judges Kimberly Campbell, Shawn Crane, and Daniel D. Diskey.

Copies to:

John A. Shahan, Esq.
536 East Tarpon Avenue, Ste. 3
Tarpon Springs, FL 34689

Lauriane Ciccarelli, Esq.
317 South Tennessee Avenue
Lakeland, FL 33801

Staff Attorney