

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

FAYEZ ABUAISH,
Appellant,

vs.

FOOD WHOLESALERS, INC., et al.,
Appellees.

Ref. No.: 18-0046AP-88B

UCN: 522018AP000046XXXXCI

ORDER AND OPINION

Appellant challenges the trial court's "Default and Default Final Judgment," entered on June 7, 2018. For the reasons set forth below, the order is reversed and the case is remanded.

Facts and Procedural History

On March 5, 2018, Food Wholesalers, Inc. filed an amended statement of claim alleging breach of an agreement for goods or merchandise in the amount of \$4591.14, plus costs and interest. On March 26, the amended statement of claim was served on Appellant in prison. On April 4, Appellant filed a pro se "Motion in Opposition to Order," in which he stated that he is in prison and quoted law about how a prisoner cannot appear in person for a civil proceeding except under extraordinary circumstances. He also presented defenses to the action and requested that the proceedings be dismissed or continued until his release from prison. On April 12, the court held a pretrial conference, and a duty judge response sheet was filed that stated "Please set a phone hearing for [Appellant]." The same day, an order for telephonic hearing was issued, which states:

[Appellant] is incarcerated at Coleman Low FCI and is scheduled to appear for a hearing on the above-styled case on Thursday, June 7, 2017 [sic] at 9:30 a.m. [Appellant] shall appear via telephone by calling the Judge's office at the following number for this hearing.

The order indicates that a copy was sent to Appellant at the prison, but not to anyone at the Department of Corrections. On June 4, 2018, the Clerk of Court docketed a correspondence from Appellant that states:

I have in [sic] order for a telephone hearing at Coleman Correctional Complex . . . for Thursday June 7, 2017 [sic] at 9:30 am. I have been instructed by the staff to contact you requesting that your offices follow the following legal matters: call this

number . . . and request to speak to the counselor A. Natal and he will scheduled [sic] conference call. Thank you for your attention in the matter.

On June 7, the second pretrial conference was held as scheduled, and Appellant did not call in to the judge's office. A "Default and Default Judgment" was entered against Appellant for failure to comply with the April 12 Order for Telephonic Hearing. Appellant then filed the instant appeal.

Discussion

"An incarcerated party has a right to be heard in civil matters if the party has brought to the court's attention his or her desire to appear personally or telephonically." *Garrett v. Pratt*, 128 So. 3d 928 (Fla. 5th DCA 2013) (citation omitted). "If a prisoner requests a telephonic hearing or asserts his desire to be heard on the matter, 'the right is clear.'" *Johnson v. Johnson*, 992 So. 2d 399, 401 (Fla. 1st DCA 2008) (quoting *Rogers v. Rogers*, 977 So. 2d 687, 687 (Fla. 4th DCA 2008)). A prisoner can assert his desire to be heard even without filing a motion to appear telephonically, as long as he indicates somehow that he wants to participate in the hearing, but cannot because of his incarceration. *See id.* (holding that a prisoner's answer brief and motion for continuance "put the trial court on notice that he wanted to participate in and had no intention to waive any right to be heard").

For a prisoner to appear telephonically, the Florida Department of Corrections requires that institutional staff initiate the phone call. *See* Fla. Admin. Code R. 33-602.205(8)(b) ("Institutional staff shall place a direct call to the court, using the most efficient and economical means available."). Consequently, courts have held that orders allowing inmates to appear telephonically must be "directed to the Department of Corrections." *See Burdoo v. Plympton*, 219 So. 3d 170, 171 (Fla. 1st DCA 2017) ("A court reversibly errs when a prisoner requests to appear telephonically, and the court fails to issue an order *directed to the Department of Corrections* requiring the prisoner to appear telephonically." (emphasis added)); *Havanner v. Hutchinson*, 162 So. 3d 1113, 1114 (Fla. 1st DCA 2015) (reversing because the trial court "failed to issue an order *directed to the Department of Corrections* requiring Appellant to appear telephonically at a specified time and date" (emphasis added)). The language of these decisions indicates that the order should be sent to someone at the Department of Corrections and not just the prisoner.

Here, the lower court correctly construed Appellant's filings as an indication that he wished to defend the lawsuit, and it entered an order for him to appear telephonically. However, the order was only sent to Appellant and not his classification officer or anyone at the Department

of Corrections. Because “the Department of Corrections requires institutional staff to initiate all such telephone calls[,] . . . [i]t is reasonable to infer from this directive that *institutional staff must first receive an order from the court* requiring an inmate to appear for a hearing by telephone on a specific date and at a specific time.” *Butler v. Norton*, 158 So. 3d 750, 751 (Fla. 1st DCA 2015) (emphasis added). Although it appears based on his letter to the court (informing it that he was told to ask the court to call and speak to his counselor) that Appellant showed the order to his counselor/classification officer, the order was not “directed to” institutional staff. Moreover, “there is a strong preference for lawsuits to be determined on the merits and . . . courts should liberally set aside defaults under appropriate circumstances.” *Geer v. Jacobsen*, 880 So. 2d 717, 720 (Fla. 2d DCA 2004).

Conclusion

Because the order for telephonic hearing was not directed to the Department of Corrections, the trial court erred in entering a Default and Default Final Judgment against Appellant for not calling in for the pretrial conference. Accordingly, the Default and Default Final Judgment must be reversed and the case remanded for the trial court to issue a new order for telephonic hearing directed to the Department of Corrections with a copy sent to Appellant’s counselor.

ORDERED AND ADJUDGED that the Default and Default Judgment is **REVERSED** and **REMANDED**.

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida this
____ day of _____

Original Order entered on April 30, 2019, by Circuit Judges Pamela A.M. Campbell,
Amy M. Williams, and Thomas M. Ramsberger.

Copies furnished to:

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