IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM BEACH, FL 33401

December 9, 2024

No. 4D2024-2176
L.T. No. COWE24025360

CURTIS UNDERWOOD, JR.
and UNKNOWN TENANTS IN POSSESSION,

Appellant(s),

v.

PROGRESS RESIDENTIAL BORROWER 7 LLC,

Appellee.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

1. The nature of the action is a tenant eviction case in The County Court of The Seventeenth Judicial Circuit In and For Broward County, Florida, Division 82, the Hon. Kal Evans; related pending preceding appeal No. 4D2023-2636 and recently filed Petition for Writ of Prohibition 4D2024-3116.

2. The ultimate disposition of the proceedings in the lower tribunal was final order for immediate default judgment for possession (R.283).

3. On April 25, 2024, appellee filed Complaint for Eviction (R.14).

4. On Wednesday, May 1, 2024, appellant was served the summons.

5. Defendant timely appeared, responded, and filed multiple defensive papers sufficient to avoid entry of default judgment (R.56, R.58, R.73, R.79).

6. The initial defensive papers were not a nullity. The trial court was required to hear and dispose of these dispositive defensive motions prior to proceeding to judgment. See § 51.011, Fla. Stat (2024); Pro-Art Lab v. V-Strategic Group, 986 So. 2d 1244 (Fla. 2008).

7. Defendant's timely papers disputed the legal sufficiency of the complaint, and disputed conditions precedent with specificity and particularity in accordance with Fla. R. Civ. P. 1.120(c) (R.79). The trial court was required to confirm the conditions precedent to suit had been satisfied, before proceeding in the matter.

8. Fla. R. Gen. Prac. Jud. Admin. 2.514(3) Period Stated in Days Less Than Seven Days: "When the period stated in days is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

9. Timely, on Wednesday, May 8, 2024, appellant filed and served Defendant's Omnibus Motion to Dismiss, Waiver Of Right To Action 83.56(5)(a), Deficient Complaint And Conditions Precedent 83.57(3), Pursuant Violation 83.67(1), Lack Of Subject Matter Jurisdiction, Motion To Abate, Supplement To Defendant's Motion To Stay, Objection To Plaintiff Proceeding To Judgment. (hereafter "Omnibus Motion to Dismiss") (R.79).

10. Specifically, initial defensive filings averred, disputed, challenged and affirmatively defended with specificity and particularity, at least: failure to state cause of action, failure to satisfy conditions precedent, waiver of right to action 83.56(5)(a), fatal defects of the pleadings, payment and satisfaction, defective termination notice, failure to comply with § 83.57(3) Fla. Stat (2024) pursuant "month-to-month" extension of the tenancy, action in bad faith violation of § 83.44 Fla. Stat (2024), prohibited practices § 83.67(3) Fla. Stat (2024), retaliatory eviction § 83.64 Fla. Stat (2024), harassment, acceptance of performance, estoppel, objection for lack of subject matter jurisdiction, and objection to entry of any default pursuant defects of the complaint.

11. Several of appellant's pre-trial defensive motions would have been dispositive of the matter. Pre-trial defensive motions requested preliminary evidentiary hearings and case management in attempt to advise the trial judge of the need to definitively establish the sufficiency of the pleadings, prerequisite satisfaction of conditions precedent, status of the lease agreement, tenant's status at property, existence of "month-to-month" extension, etc.

12. No preliminary hearings were ever held on any of these threshold matters. All dispositive defensive motions remain pending, unheard, unconsidered, and undisposed.

13. On Wednesday, May 8, 2024 appellant filed and served Defendant's Motion To Determine Rent, Motion Take Judicial Notice, Objection To Entry Of Default (hereafter "MTDR") (R.104) timely in accordance with § 83.60 Fla. Stat. (2024).

14. The trial court refused to hold any of the preliminary hearings required under Fla. R. Civ. P. and mandatory to acquire subject matter jurisdiction and the statutory authority necessary to enforce § 83.60(2) Fla. Stat. (2024).

15. Instead, the trial court unilaterally scheduled a premature unauthorized hearing (R.161) for August 16, 2024, on Plaintiff's Motion To Strike Defendant's Motion To Determine Rent And Plaintiff's Motion For Immediate Default Judgment Of Possession.

16. On August 14, 2024, appellant filed Motion for Case Management (R.254) requesting case management to avoid statutory and procedural error(s) and preserved written objection(s) to the compounding procedural infirmities of the proceedings.

17. The trial court refused to consider or hear any of the preliminary dispositive matters and conditions precedent to suit, and therefore failed to acquire the statutory authority necessary to enforce § 83.60(2), Fla. Stat. (2024); as a matter of law.

18. Defendant's timely responsive papers contained no less than six (6) descript challenges fatally dispositive to plaintiff's claim, or procedurally mandatory to establish jurisdiction; including lack of subject matter jurisdiction, challenge to standing, conditions precedent, waiver to action, defective pleadings, payment and satisfaction, prohibited practices, waiver by acceptance of performance, estoppel, bad faith, retaliatory eviction, extrinsic and intrinsic fraud, etc. Appellant alleged payment and satisfaction (R.79).

19. The trial court demonstrated prejudice and bias, grossly abused discretion, and committed numerous compounding error(s) by refusal to schedule, hear, consider or dispose of any preliminary defensive motions.

20. The unilateral scheduling of the August 16, 2024, hearing, over and above rightful application of procedure, despite numerous prior written objections, indicated without any doubt, that the trial judge had prejudged the outcome of the case, and that granting of instantaneous default judgment was predetermined.

21. On August 15, 2024, appellant filed Defendant's Motion For Relief Fla. R. Civ. P. 1.540 (R.260) objecting to the August 16, 2024, hearing having prospective application and "Specifically, Attorney Lippman has repeatedly made false statements, in writing, misrepresented the facts, the nature of the proceedings, and the contents of the pleadings."

22. Unsurprisingly, at the August 16, 2024, zoom hearing, based solely upon fraudulent unsworn statements from opposing counsel, the trial judge falsely and wrongly struck tenant's MTDR as untimely (R.281, T.354), clearly erroneous to the evidence, and the official record.

23. MTDR was timely, for clarity and illustrative purposes, May 1-8, 2024, see below:

Sun	Mon	Tue	Wed	Thu	Fri	Sat
			1 SERVICE	2 DAY 1	3 DAY 2	4 EXCLUDED
5 EXCLUDED	6 DAY 3	7 DAY 4	8 DAY 5	9	10	11

24. The trial court's erroneous ruling striking the motion as untimely (R.281) was not supported by any competent, substantial evidence (R.354, Transcript) was entered despite rightful accurate correction of the facts, and despite and over contemporaneous objections.

25. The transcript of hearing August 16,2024 supports the conclusion trial court was searching to rationalize its preferred result (R.354).

26. Notably, the ruling to strike MTDR was based entirely on the false and misleading claim that the motion was untimely. The ruling, order, and the official record contain no claim, analysis or discussion whatsoever as to the contents or merits of the MTDR.

27. The trial court then proceeded to rule and enter instantaneous default judgment for the plaintiff (R.283) based upon the fabricated and erroneous striking of the MTDR.

28. The ultimate result of this case, instantaneous default judgment, was not supported by any competent substantial evidence and lacked support in any valid alternative theories or any other substantial credible evidence in the record.

29. The default judgment grossly abused discretion in its reliance on improper factors, clearly erroneous interpretation of the facts, serious mistakes weighing the facts. *Inter alia,* the baseless and inaccurate striking of tenant MTDR alone requires reversal for new trial.

30. § 83.60(2) Fla. Stat. (2024) sets forth that tenant EITHER pay undisputed rent into the registry OR request a hearing to determine the amounts. The trial court entered baseless instantaneous default supposedly for not having done BOTH... paid AND requested the hearing. That is not the law.

31. The trial court's refusal to comply with required mandatory statutory and civil procedures, failure to hear or consider dispositive matters, refusal to hold any preliminary evidentiary hearings wrongfully deprived appellant of due process and constitutional right(s).

32. In failing to comply with the statutory construction of its authority the trial court entered premature, unlawful, invalid and void order(s), which lack the valid force of law. The trial judge's conduct amounts to unauthorized, extra-judicial conduct, under color of law. See Title 18, U.S.C., Section 242.

33. The resulting erroneous instantaneous default judgment departs from the essential elements of law, deprived tenant of due process, does injurious and harmful manifest injustice, violated state and federal fair housing regulations, violated appellant's basic, fundamental, common law and constitutional rights.

SUMMARY OF THE ARGUMENT

The central question of this appeal is the county court trial judge's premature, unauthorized, mistaken application of § 83.60(2) Fla. Stat. (2024). Appellant is entitled to due process, full and fair hearing on the merits, notice and opportunity to be heard, before being deprived of liberty or property. See Art. I, §2, Fla. Const., Art. I, §9, Fla. Const., Art. I, §21, Fla. Const., Art. I, §23, Fla. Const. The facts here establish appellant was deprived of fair trial. See Royster v. State, 643 So. 2d 61 (Fla. 1d DCA 1994).

There is no dispute that the trial court had the power to adjudicate a tenant eviction action in the locational jurisdiction. There is dispute as to whether appellee lawfully

invoked the court's jurisdiction by filing a legally sufficient pleading, and satisfied conditions precedent to filing suit. There is dispute whether the trial court acquired subject matter jurisdiction and statutory authority, and whether the trial court failed to comply with the mandatory requirements necessary to exercise that jurisdiction.

The complaint was defective to invoke the court's jurisdiction, as a matter of law, and appellant challenged the legal sufficiency of the pleading. The trial court was required to hear and dispose of that question by holding preliminary hearing(s). No such hearing was ever held. Landlord failed to satisfy various conditions precedent to filing suit, appellant adequately challenged whether conditions precedent had occurred. The trial court failed and refused to settle the dispositive question(s) of satisfaction of conditions precedent. No preliminary hearings were ever held.

These compounding errors, mainly the trial court's failure and refusal to follow mandatory civil procedure and mandatory statutory requirements, among others, meant that the court failed to acquire the statutory authority necessary to exercise jurisdiction.

The trial court misapprehended and misapplied statutory constructions of § 83.59 Fla. Stat. (2024); § 83.60(2) Fla. Stat. (2024); and § 51.011 Fla. Stat. (2024). The case was initiated citing § 83.59 Fla. Stat. (2024) and § 51.011 Fla. Stat. (2024), neither of which provide for instantaneous default; reversal and new trial are warranted. § 83.60(2) Fla. Stat. (2024) sets forth tenant either pay undisputed rent into the registry OR request a hearing to determine the amounts. The trial judge falsely struck MTDR, and entered default judgment, ostensively for tenant not having done both.

Pursuant compounding legal, statutory and procedural error(s) the trial court was without valid legal authority to conduct the August 16, 2024, hearing on Plaintiff's Motion to Strike (R.126), was without valid legal authority to strike the MTDR (R.281), and was without authority to enter the ultimate relief of instantaneous default judgement for possession against tenant (R.283).

The ruling was not based on competent, substantial evidence, and the resulting default judgment lies wholly unauthorized, unfounded, fatally flawed and extra-jurisdictional, as a matter of law. Therefore, absent valid statutory authority to give effect to the granted relief, the judgment is null and void; should and must be reversed.

STANDARD OF REVIEW

The issues present pure questions of law, reviewed de novo, related to application of at least, § 51.011, Fla. Stat. (2024); § 83.56, Fla. Stat. (2024); § 83.57, Fla. Stat. (2024); § 83.59, Fla. Stat. (2024); § 83.60, Fla. Stat. (2024); § 83.67, Fla. Stat. (2024).

Whether the trial court applied the correct legal standard is subject to de novo review. See Nelson Tree Serv. Inc. v. Gray, 978 So.2d 198, 201 (Fla. 1d DCA 2008). Whether a trial court has complied with the guarantees of due process is subject to de novo review. Dept of Revenue ex. Rel. Poynter v. Bunnell, 51 So. 3d 543, 546 (Fla. ld DCA 2010). Where statute is clear, courts consider the statute's plain and ordinary meaning. See State v. Burris, 875 So. 2d 408 (Fla. 2004); Lee County Elec. Coop., Inc. v. Jacobs, 820 So.2d 297, 303 (Fla. 2002).

The standard of review for the factual findings is whether the findings are supported by competent, substantial evidence. Stephens v. State, 748 So. 2d 1028, 1031 (Fla. 2000). Competent substantial evidence is enough evidence to permit a rational trier of fact to reach the conclusion that was reached. Boyd v. State, 910 So. 2d 167 (Fla. 2005).

THE ARGUMENT

Appellant has alleged ad nauseum, it was appellee's own initial breach in the preceding matter 4D2023-2636 which led to this unfortunate sequence of events; the Law of the Case, upon which 4D2024-2176 now must also be considered.

The county courts hold no inherent authority over the defendant, the case, or the subject matter, except by establishing its authority to act in the matter by required compliance in accordance with relevant statutory frameworks. See Art. V, §6, Fla. Const.

"A court's authority to exercise its subject matter jurisdiction over a case may be restricted by failure to comply with statutory requirements that are mandatory in nature, and thus, are prerequisite to court's lawful exercise of that jurisdiction." Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (Fla. 1927); Moore v. Com. 527 S. 2d 406, 259 Va. 431 (2000).

Conditions Precedent

The trial court here was required *stare decisis* to hold preliminary evidentiary hearings as to disputed conditions precedent, and any issues dispositive of the cause; including alleged grounds for dismissal; prior to any consideration of enforcement of § 83.60(2), Fla. Stat. (2024). The court's refusal to schedule, consider, hear and dispose of pending dipositive defensive motions regarding satisfaction of conditions precedent to suit,

precluded application of § 83.60(2), Fla. Stat. (2024). It follows, resulting instantaneous default judgment was therefore premature, erroneous, and unauthorized.

Mitchell v. Dimare 936 So. 2d 1178 (Fla. 5d DCA 2006) defined "condition precedent" as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises."

Appellant timely and satisfactorily challenged satisfaction of conditions precedent with specificity and particularity in accordance with Fla. R. Civ. P. 1.120(c) (R.79). The trial court was required to hold preliminary evidentiary hearing to establish satisfaction of conditions precedent, before proceeding in the cause.

A statutory cause of action cannot be commenced until Plaintiff has complied with all conditions precedent. See Ferry Morse Seed Co. v. Hitchcock, 426 So. 2d 958 (Fla. 1983). Where a party bringing a lawsuit has obligations to meet prior to instituting a lawsuit, failure to satisfy those conditions warrants dismissal of the civil complaint. If the plaintiff is unable to establish that conditions precedent have been satisfied, the plaintiff's case must be dismissed. See City of Coconut Creek v. City of Deerfield Beach, 840 So.2d 389, 393 (Fla. 4d DCA 2003).

The conditions precedent are necessary to lawfully implicate the court's statutory authority, the court's power to "give effect" to sought relief. Baker v. Clifford-Matthew Inv. Co., 128 So. 827, 829 (Fla. 1930). These issues are expressly not jurisdictional, or affirmative defenses, but rather landlord's obligations as matter of law to bring valid suit that "gives effect" to the statutory constructions in the county courts. Clark v. Hiett 495 So.

2d 773 (Fla. 2d DCA 1986): "By having brought suit for eviction in county court, Hiett became bound by the statutory provisions applicable to that proceeding."

Where less than all the requisite elements of a cause of action exist when the complaint is filed, the complaint must be dismissed without leave to amend. Rolling Oaks Homeowners Assn v. Dade County, 492 So.2d 686 (Fla. 3d DCA 1986).

Appellant specifically and particularly alleged plaintiff failed to provide non-defective termination notice (R.79). The trial court was required to hold preliminary evidentiary hearing(s) to determine whether the rental agreement was lawfully terminated.

The service of a proper, non-defective termination notice is a statutory condition precedent to the filing of an eviction action. See Investment and Income Realty v. Bentley, 480 So. 2d 219, 220 (Fla. 5d DCA 1985). The record is devoid of evidence to support conclusory assertions as to effective termination claimed by three-day statutory notice. See Brown v. Aswan Villas Apts. LTD, 705 So. 2d 1043 (Fla. 3d DCA 1998).

The termination notice is defective, where it makes demands or alleges non-compliance, but refuses any right, time, or opportunity to meet the demand; creating impossibility to perform or cure any alleged non-compliance to avoid termination. See Swift Beef Co. v. Alex Lee, Inc., No. 17-2339 (Fla. 4d DCA 2019).

Fla. R. Civ. P. 1.130(a) requires that all documents upon which an action is based shall be incorporated or attached to the pleading. Plaintiff failed to attach a non-defective termination notice to the complaint, therefore failed to attach proof of condition precedent to the complaint. Appellant specifically and adequately disputed claim of lawful

termination in accordance with Fla. R. Civ. P. 1.120(c). The trial court refused to settle and dispose of the question(s) by preliminary evidentiary hearing. In so doing, failed to attach the statutory powers of this county court, to the action.

"On remand in the present case, the circuit court is to conduct an evidentiary hearing regarding the satisfaction or waiver of the conditions precedent, and regarding Mr. Lenet's allegation that RSG took possession of the residence. It is premature to direct the deposit of rent into the registry before those issues have been decided. That decision will control the amount of rent, if any, accrued and to be paid into the registry (or refunded to RSG from the registry), and apparently will also determine which party breached the lease." See RSG, LLC v. Lenet, 107 So. 3d 1187 (Fla. 3d DCA 2013)."

"The resolution of this factual dispute would determine whether section 83.60 is applicable. Because such a determination would be dispositive, we hold that the trial court was required to conduct an evidentiary hearing before determining whether the Freys were required to pay money into the court registry." See Frey v. Livecchi, 852 So. 2d 896 (Fla. 4d DCA 2003). "Because the trial court failed to conduct such a hearing, we find that the trial court erred in imposing such a requirement, erred in entering the default judgment, and reverse the entry of the final default judgment."

The evidentiary determination of existence of Month-to-Month Extension pursuant Section 3.5 of the Lease, would be significant as a threshold matter to determine if landlord complied with termination notice requirements of § 83.57, Fla. Stat. Therefore,

that determination would be dispositive of the complaint, and preliminary hearing on that question was required, prior to entry of any instantaneous default judgment.

Notably, the complaint itself claims to be seeking eviction upon termination of "Month-to-Month" lease... There is clear evidence, including the admission within the plaintiff's own pleadings, of the existence of the month-to-month extension. Which would require a subsequent 30-day notice of termination. In other words, appellee failed to satisfy the conditions precedent to filing suit, which requires dismissal of the complaint. The trial court was required to make this important and dispositive determination of the status of the tenancy, prior to entry of any default judgment. And reversal and remand should and must be granted, with instructions for lower court to perform that evidentiary determination, which would dispose of the case, in the tenant's favor. Therefore, it cannot be said that the final judgment arrived at the right result, by the wrong road ie Tipsy Coachman Doctrine. Quite the opposite - if law and procedure was followed, the case must be dismissed.

Dispositive Matters

The instantaneous default judgment was entered with multiple defensive motions pending which would have been dispositive of the matter. The default judgment was erroneous and departs from the essential elements of law; should and must be reversed.

All relevant case authority, the essential elements, and basic rules of procedure dictate that conditions precedent, and any sharp questions of fact dispositive of the case, must be heard and determined on the merits, BEFORE entry of any default by § 83.60(2) Fla. Stat. (2024). Appellant reiterated numerous written objections, that the county court

lacked statutory authority to enforce terms and conditions of § 83.60(2) Fla. Stat. (2024) upon the litigants, having failed to apply due process and "give effect" to its powers by preliminary evidentiary hearing(s). See Baker v. Clifford-Matthew Inv. Co., 128 So. 827, 829 (Fla. 1930).

Default judgment is not appropriate where there are motions undisposed which would affect Plaintiff's right to bring action. It was established long ago that a court may not enter a default judgment with an undisposed motion pending that would affect the plaintiffs right to proceed to judgment. See Punta Gorda Ready Mixed Concrete, Inc. v. Green Manor Constr. Co., 166 So.2d 889, 890 (Fla. 1964) citing Cobb v. Trammell, 73 Fla. 574, 74 So. 697 (Fla. 1917); Dudley v. White, 44 Fla. 264, 31 So. 830 (Fla. 1902); see also Goodman v. Joffe, 57 So.3d 1001 (Fla. 4d DCA 2011); Vacation Escape, Inc. v. Michigan Nat. Bank, 735 So.2d 528, 529 (Fla. 4d DCA 1999); Cardiosonx Labs., Inc. v. Aguadilla Med. Services, Inc., 100 So.3d 285, 287 (Fla. 3d DCA 2012); Lakeview Auto Sales v. Lott, 753 So.2d 723 (Fla. 2d DCA 2000).

"The resolution of this factual dispute would determine whether section 83.60 is applicable. Because such a determination would be dispositive, we hold that the trial court was required to conduct an evidentiary hearing before determining whether the Freys were required to pay money into the court registry." See Frey v. Livecchi, 852 So. 2d 896 (Fla. 4d DCA 2003). "Because the trial court failed to conduct such a hearing, we find that the trial court erred in imposing such a requirement, erred in entering the default judgment, and reverse the entry of the final default judgment."

Timely defensive averments included, within five (5) days of service:

1. May 6, 2024, Defendant's Motion to Take Judicial Notice and Notice of Related Cases;
2. May 7, 2024, Defendant's Motion to Stay, Omnibus Reply to Plaintiff’s Response to Motion to Take Judicial Notice;
3. May 8, 2024, Defendant's Motion to Determine Rent, Motion Take Judicial Notice, Objection to Entry of Default;
4. May 8, 2024, Defendant's Omnibus Motion to Dismiss, Waiver of Right to Action 83.56(5)(a), Deficient Complaint and Conditions Precedent 83.57(3), Pursuant Violation 83.67(1), Lack of Subject Matter Jurisdiction, Motion to Abate, Supplement to Defendant's Motion to Stay, Objection to Plaintiff Proceeding to Judgment
    a. The title alone, constitutes a statement of defenses of fact and law satisfactory to substantively "answer" the complaint and avoid default;
    b. The title alone, demonstrates entry of default was premature in failure to consider dispositive matters of fact and law, timely raised:
        i. Waiver of Right to Action 83.56(5)(a)
        ii. Defects of the Pleadings
        iii. Failure to Satisfy Conditions Precedent
        iv. Lack of Subject Matter Jurisdiction
        v. Objection to Plaintiff’s Right to Proceed to Judgment

Appellant's timely responsive papers challenged legal sufficiency of the complaint, and contained no less than six (6) descript challenges fatally dispositive to plaintiff's claim, or procedurally mandatory to establish jurisdiction and requested preliminary evidentiary hearing(s); including general or specific averments to the following, at least:

Fla. R. Civ. P. 1.120(c) Conditions Precedent.

Fla. R. Civ. P. 1.130; Attaching Copy of Cause Of Action And Exhibit

Fla. R. Civ. P. 1.140(1) lack of jurisdiction over the subject matter

Fla. R. Civ. P. 1.140 (b)(6) failure to state a cause of action;

Fla. R. Civ. P. 1.140; (d) Preliminary Hearings. "must be heard before trial"

Fla. R. Civ. P. 1.420 (b) Involuntary Dismissal. "failure to comply with these rules"

Waiver of Right to Action § 83.56(5)(a)

Conditions Precedent § 83.44 Fla. Stat.

Conditions Precedent § 83.57 (3)Fla. Stat.

Conditions Precedent § 83.59 Fla. Stat.

Conditions Precedent § 83.60 (2)Fla. Stat.

Conditions Precedent § 83.64 Fla. Stat.

In short, the county court failed to acquire jurisdiction and implicate its statutory authority to grant or give effect to any relief, or to impose any terms or conditions whatsoever upon the litigants, by its failure to confirm or reject the assertions and challenges to conditions precedent. ***The cart before the horse***. See RSG, LLC v. Lenet, 107 So. 3d 1187 (Fla. 3d DCA 2013).

Default Misapprehends § 83.60 Fla. Stat. (2024)

The trial court misunderstood, misapplied, erred and departed from the essential elements of law in its mistaken, unauthorized disposition of the case by premature application of § 83.60 (2), Fla. Stat. (2024). There are no valid legal grounds for instantaneous default under § 83.60(2), Fla. Stat. for failure to pay into the registry, where the tenant timely filed motion to determine rent, and where there is not first a court order which directed and required payment into the registry.

The court never directed or ordered tenant to pay into the registry, and never set any amount which was supposedly due to be paid into the registry. Where there is no court order in the record ordering any such required compliance, there can be deliberate or contumacious disregard for the court's authority. See Swindle v. Reid, 242 So.2d 751 (Fla. 4d DCA 1970).

§ 83.60 Fla. Stat. (2024) sets forth tenant EITHER pay undisputed rent into the registry OR request a hearing to determine the amounts. The court's Order Denying Motion entered August 23, 2024 (R.498) stated “The Clerk of the Court confirmed that no payment had been made although both parties were well aware of the rent due.” The wording of this order clearly established that the trial judge misapprehended the requirements of the statutory construction of § 83.60(2) Fla. Stat. (2024).

Axen v. POAH Cutler Manor, LLC, 323 So. 3d 800 (Fla. 3d DCA 2021): "The pertinent language requires "the tenant to pay the rent into the registry of the court **OR** to file a motion to determine the amount of rent to be paid…" (emphasis added). And

"footnote 2" which supports the position of this appeal: "[Landlord] argues that we need not address the motion to determine rent because Axen was late in depositing rent during the pendency of the action. But that argument misconstrues the statute and fails to give meaning to each provision."

Kaufman v. High Seas, LLC, No. 4D2022-3023 (Fla. 4d DCA 2024), "On appeal, the tenant argues that the trial court erred in entering a default judgment without holding an evidentiary hearing on his motion to determine rent. We agree." And "section 83. 60(2), does not require a tenant to assert meritorious defenses to avoid an immediate default judgment for possession. Instead, ...a tenant must... timely move to determine rent. The tenant timely moved to determine rent. Consequently, the trial court erred... " (R.105). In this case, appellant timely moved to determine rent and *stare decisis* with all governing case law, any instantaneous default judgment for alleged non-payment into the registry was premature and erroneous, as a matter of law; should and must be reversed.

Joerger v. Lake Alfred Place, LLC, No. 6D23-2223 (Fla. 6d DCA 2024) "The trial court had to conduct a hearing and make a rent determination, and its premature entry of default final judgment was in error… We vacate the final default judgment of eviction and remand for further proceedings." See also Singh v. Kumar, 234 So.3d 1, 3 (Fla. 4d DCA 2017); Frey v. Livecchi, 852 So.2d, 896 (Fla. 4d DCA 2003); RSG, LLC v. Lenet, 107 So. 3d 1 187 (Fla. 3d DCA 2013); Axen v. POAH Cutler Manor, LLC, 323 So. 3d 800 (Fla. 3d DCA 2021); Heart of Adoptions, Inc. v. J.A. 963 So. 2d 189, 199 (Fla. 2007); Prince v.

MCR Apts. 1, LLC, 326 So.3d 228, 228 (Fla. 3d DCA 2021); Sharaka v. E&A, Inc., 135 So. 3d 428 (Fla. 2d DCA 2014); Price v. Torkaman, No. 4D2023-1872 (Fla. 4d 2024).

There are important distinctions between the facts here *contra* Gill v. Parvez, 332 So.3d 543 (Fla. 3d DCA 2021). The facts here do NOT align with *Gill*. For simplicity, citing from appellee's "Plaintiff's Motion To Strike…" (R.126). Firstly, the court in Gill stated: "The record contains no claim of payment by the Gills. Therefore, without more, we conclude that the striking of pleadings and entry of default and default final judgment complied with the statutory scheme." In contrast, appellant here did clearly aver and affirmatively state defense of payment and satisfaction, within timely Omnibus Motion to Dismiss (R.79). Specifically, "Landlord continued to enjoy performance of billing and satisfaction various charges, services, utility fees, communications and tenant's cooperation other matters as governed by provisions lease agreement." (R.81). And "Landlord, on the contrary, continued to send Defendant written notices, bills and communications, charged and accepted satisfaction for services, responded to requests and inquiries (Ex. A) as if tenancy was still in valid effect i.e. acceptance of tenant's performance." (R.82-83). Therefore, the facts here differentiate from *Gill*, and *Gill* does not rule. The trial court's failure to hear and dispose of appellant's Omnibus Motion to Dismiss (R.79) did not comply with the statutory scheme, and entry of default judgment was erroneous.

In this case, the trial judge's striking of MTDR was false, erroneous to the evidence, prejudiced biased and prejudged, and striking of the MTDR itself abused discretion in

multiple compounding errors discussed further, herein. Therefore, further differentiated from *Gill*. The facts present here likewise differentiate this case from Stanley v. Quest Intern. Inv., Inc., 50 So. 3d 672, 672-74 (Fla. 4d DCA 2010). In *Stanley* the defendant in that case never filed MTDR, and instead chose to defend the claim exclusively upon constitutional challenge issues. *Stanley* does not govern, given the facts of this case.

All relevant case authority rules this case toward reversal. § 83.60 Fla. Stat. (2024) sets forth tenant EITHER pay undisputed rent into the registry OR request a hearing to determine the amounts. The trial court erred in falsely striking MTDR, and entered default against tenant for not having done BOTH... requested the hearing AND paid into the registry… That is not the law. The trial court abused discretion; default final judgment should and must be vacated.

§ 83.59, Fla. Stat. (2024) Does Not Provide For Instantaneous Default

The Supreme Court rules tenant defendants are entitled to trial on the merits in an action seeking relief under § 83.59, Fla. Stat. (2024). The complaint claimed relief seeking enforcement § 83.59, Fla. Stat. (2024) and § 51.011, Fla. Stat. (2024) (R.14).

The trial court's erroneous application of § 83.60(2), Fla. Stat. (2024) was unfounded in the law, unwarranted, and had no valid basis in the facts, law or procedure.

"Section 51.011 simply does not contain any language providing for instantaneous defaults." Pro-Art Lab v. V-Strategic Group, 986 So. 2d 1244 (Fla. 2008). Justice Charles T. Wells, concurrence: "It appears to me that where this case got off of the right track was in the granting of the default. The practical fact here was that the defendant, as in the

Crocker case, timely served papers in the case, setting forth defenses. As in Crocker, I cannot agree that what the defendant filed was a nullity, and therefore the default should not have been entered." Ref: Crocker v. Diland Corporation, 593 So. 2d 1096 (Fla. 5d DCA 1992).

Under the rule governing defaults, if a party who has appeared fails to timely plead but does plead or otherwise defend before the hearing on the motion for default, default is improper. See Fla. R. Civ. P. 1.500(c); Irwindale Co., N.V. v. Three Islands Olympus, 474 So.2d 406 (Fla. 4d DCA 1985); Crocker v. Diland Corp., 593 So. 2d 1096 (Fla. 5d DCA 1992): "Although what was filed was denominated a "motion to dismiss" not an answer, it did contain the statement of a defense of law or fact. In essence, Diland filed a defective answer."

Pro-Art Lab v. V-Strategic Group, 986 So. 2d 1244 (Fla. 2008) holds that standard rules of civil procedure apply to summary eviction proceedings under chapter 51. "The plain text of section 51.011 does not provide for instantaneous defaults in the event a party has filed a defensive motion and thereafter an untimely responsive pleading"

Meaning, any failure to label timely defensive motion as "Answers" does not provide for entry of immediate default, by the striking of defensive pleadings, motions, or defenses. Pro-Art Lab v. V-Strategic Group, 986 So. 2d 1244 (Fla. 2008) holds simply that Respondent may be limited to those defenses which were timely raised, at the statutorily required final trial. Appellant here timely appeared, filed defensive papers, meritoriously averred the claims of the complaint, affirmatively defended and participated in the

proceedings. Instantaneous default judgment was unlawful, extra-judicial, and unauthorized.

Quoting, Crawford v. Grubb 337 So. 3d 521 (Fla. 2d DCA 2022): "Moreover, because Grubb did not seek to evict Crawford for failing to pay rent, the summary eviction procedure set forth in section 83.60, Florida Statutes, cannot support the judgment issued here. That procedure permits a court to summarily enter a default judgment ***only in a dispute over nonpayment of rent*** when the defendant does not pay rent into the court registry." (emphasis added). And continued: "Instead, section 83.59 applies to Grubb's action based on the grounds she raised in her complaint. That section approves the use of a different type of expedited determination, set forth in section 51.011, Florida Statutes. But the procedure in section 51.011 ***expressly preserves the parties' rights to discovery and trial***. ld. Crawford received neither here." (emphasis added).

As stated clearly in appellant's undisposed Motion for Involuntary Dismissal (R.179), there is no valid legal basis for entry of default judgment for immediate possession under § 83.60(2), Fla. Stat. under this set of facts. Where no monetary relief was requested, no amount of past due rent was claimed or demanded by the petitioner, and no order was ever entered directing the amounts of any payment into the registry.

Therefore, entry of default judgment for supposed non-payment to the registry amounts to the trial court ruling on matters that were never raised, granting of relief which was not satisfactory plead by either party, and ruling on matters not currently before the court. The trial judge abused discretion when it effectively performed sua sponte posteriori

amendment of the pleadings to incorporate a claim for non-payment of rent, where no such monetary claims, for any past due rent, was ever prayed for by the complaint. See McWhirter Reeves, etc. v. Weiss, 704 So. 2d 214, 216 (Fla. 2d DCA 1998) (holding that the trial court erred when it considered evidence outside the complaint).

"Just as the landlord does not have to assert all its claims in the action to remove the tenant, the tenant does not have to assert all its defenses. The tenant may await the landlord's action for damages to assert any monetary claims by way of affirmative defenses or counterclaims." See Camena Invs. & Prop. Mgmt. Corp. v. Cross, 791 So. 2d 595, 596 (Fla. 3d DCA 2001).

Instant default judgment constitutes gross abuse of discretion, departure from the essential elements of law, fundamental error obvious on face of the order, and manifest injustice. Defendant repeatedly preserved written objection. (R.186).

Defendant specifically defended that the amount of set off for Treble Damages § 83.67(6) Fla. Stat. (2024) would affect calculation of any amount of rent owed (R.79, R. 172), and thus was precedent to determining any amounts due, which established independent grounds for the factual and legal necessity to hold a valid Motion to Determine Rent hearing. See 3618 Lantana Road Partners, LLC v. Palm Beach Pain Management, Inc. 57 So. 3d 966 (Fla. 4d DCA). Erroneous striking of tenant's MTDR which failed to consider, and de facto disposed of tenant's counterclaim by instantaneous default, abused discretion. See Amiri v. McGreal, 323 So. 3rd 242 (Fla. 2d DCA 2021).

Accordingly, the facts here *sub judice*, the trial court's erroneous ruling of default based on supposed non-payment of rent into the registry; where no claim for unpaid rent was made in the complaint; and no order was entered directing payment into the registry, grossly abused discretion in that the ruling was based on improper factors, considered matters not before the court, and ruled on issues entirely outside the record.

Motion to Determine Rent Was Erroneously Stricken

August 8, 2024 Motion for Involuntary Dismissal (R.179) stated: "Defendant preserves written objection to striking any defensive pleadings."

Specifically, the MTDR was objectively timely filed. There is no alternative theory or evidence in the record which would support the court's ruling. Tenant's MTDR should never have been stricken. Litigants have the right to have their filings accepted by the court. See Singh v. Kumar, 234 So.3d 1, 3 (Fla. 4d DCA 2017).

Summary procedure 51.011 provides that all other rules of standard procedure apply. Therefore, tenant was entitled to standard procedure i.e. notice if their filings were being rejected, the reason, and reasonable opportunity to cure whatever defect. The trial court provided no notice that defensive filings were being rejected or were otherwise defective or insufficient. And, even if other grounds had been stated, defendant was given no notice or opportunity to cure, amend, or address any other such claimed defect. See Singh v. Kumar, 234 So.3d 1, 3 (Fla. 4d DCA 2017). The only grounds referenced by the court's ruling was the false, fabricated and clearly erroneous assertion that MTDR was untimely (R.281, R.354 Transcript). There is no competent evidence which supports that finding.

Generally, the striking of pleadings is not favored and all doubts are to be resolved in favor of the attacked pleadings (Costa Bella Dev. Corp. v. Costa Dev. Corp., 445 So.2d 1090, 1090 (Fla. 3d DCA 1984); Weiss, 704 So. 2d at 216 (citing Ivey v. So. States Power Co., 128 Fla. 345, 174 So. 834 (1937); (R.180).

Before striking party's pleadings and entering default… trial court must make finding that non[compliance] was willful or done in bad faith or was deliberate and in contumacious disregard of court's authority. Trupei v. City of Lighthouse Point, 506 So. 2d 19 (Fla. 4d DCA 1987). No such facts were ever established in this case.

"Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Independent Oil and Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F. 2d 927,929 (Fla. ld DCA 1988); Anderson v. Cryovac, Inc., 862 F. 2d 910, 923 (Fla. ld DCA 1988).

In reliance on improper factors, this trial court clearly erred in its interpretation of the facts. See Baker v. Myers Tractor Services, 765 So. 2d 149 (Fla. ld DCA 2000); Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983); Tramel v. Bass, 672 So. 2d 78, 82-83 (Fla. ld DCA 1996).

As plainly evidenced by the transcript of August 16, 2024, hearing (R.354) the court relied solely upon improper factors, specifically fraudulent misstatements of fact, and false misleading unsworn comments of opposing counsel, as the primary factor in its ruling.

Appellant has proved by clear and convincing evidence counsel's misrepresentation of the facts, and the court's direct reliance on those factors, resulted in subversion of the administration of justice in this matter to appellant's prejudice and injury. Counsel's misrepresentations to the court were provably false and clearly erroneous, on the face of the official record.

An attorney's unsworn statements of fact do not establish a fact. It is not evidence. In order to establish a fact, an attorney must provide sworn testimony through a witness. See Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So. 2d 1015 (Fla.4d DCA 1982); Arnold v. Arnold, 889 So. 2d 215 (Fla. 2d DCA 2004); H.K. Development, LLC v. Greer, 32 So. 3d 178 n.4 (Fla. ld DCA 2010); Smith v. Smith, 64 So. 3d 169 (Fla. 4d DCA 2011) ("As we have explained, we reject the use of unsworn assertions made by attorneys as evidence.")

A trial court 'cannot rely upon these unsworn statements of fact as the basis for the trial court's factual determinations... [and the appellate court] cannot so consider them on review of the record." See Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So. 2d 1015 (Fla. 4d DCA 1982).

The court inarguably relied upon false statements made by counsel, as no other "evidence" was taken or presented at Hearing August 16, 2024. No witnesses were ever sworn. No testimony was ever taken. No exhibits were ever entered. No factual evidence was ever presented to the record. The court's ruling exists entirely unfounded and based on

improper factors, outside the official record. There is no competent, substantial evidence to support the court's ruling (R.354).

Citing Cox v. Burke, 706 So. 2d 43, 47 (Fla. 5d DCA 1998): The record demonstrates, clearly and convincing evidence that Attorney Lippman set in motion a sentient calculated scheme to interfere with the judicial system's ability to impartially adjudicate this matter, by improperly influencing the trier of fact and unfairly hampering the presentation of the opposing party's claim or defenses. See Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (Fla. 1d DCA 1989).

"The trial court erred by relying on the unsworn statements of counsel in makings its decision and thus, the appellate court reversed the trial court's decision and remanded for further proceedings." See Brown v. School Bd. of Palm Beach County, 855 So. 2d 1267 (Fla. 4d DCA 2003). Upon strong showing that the court's ruling was based entirely on mistaken and improper factors, fatal disposition and instantaneous default should be reversed. See Jacob v. Henderson, 28 Fla. L. Weekly D286 (Fla. 2d DCA 2003).

Rosenthal v. Rodriguez, 750 So. 2d 703, 704 (Fla. 3d DCA 2000): A party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [their] ends." See Metropolitan Dade County v. Martinsen, 736 So. 2d 794, 795 (Fla. 3d DCA 1999) (quoting Hanono v. Murphy, 723 So. 2d 892, 895 (Fla. 3d DCA 1998)); O'Vahey v. Miller, 644 So. 2d 550, 551 (Fla. 3d DCA 1994); Kornblum v. Schneider, 609 So. 2d 138, 139 (Fla. 4d DCA 1992).

In ruling default solely "upon" unsworn statements of counsel, the judgment lies ungrounded, unfounded, in error and abuse of discretion; departure from established judicial principles; departure from the essential elements of law; a manifest injustice; and miscarriage of justice. The default judgment for immediate possession is unlawful, based on fraud, definitively unauthorized and legally insufficient, a ‘wrongful eviction’ as defined See LK Group Holding Co. v. Spurrier Inv., Inc., 110 So. 3d 511 (Fla. 4d DCA 2013); Adelhelm v. Dougherty, 129 Fla. 680,176 So. 775 (Fla. 1937).

The default final judgment was erroneous, evidentiarily insufficient, wrongful striking of MTDR was based on false, fraudulent, and improper factors, outside the record, and the resulting default final judgment should and must be reversed.

Default Should Be Liberally Reversed

Florida courts do prefer to decide cases on the merits of the claims rather than on a technicality. See J.J.K. Int’l, Inc. v. Shivbaran, 985 So. 2d 66, 69 (Fla. 4d DCA 2008).

The policy in Florida on setting aside defaults to permit a trial upon the merits, is one of liberality. See Espinosa v. Racki, 324 So. 2d 105 (Fla. 3d DCA 1976).

The official record does not support the conclusion tenant acted in willful disregard, or willful refusal, or any willful failure to submit to court's (unestablished) authority under § 83.60(2), Fla. Stat. (2024). In as much as the court may have intended to imply the default was entered as a sanction, the resulting orders are fatally flawed and subject to automatic reversal. See Santuoso v. McGrath Assoc., Inc., 385 So. 2d 112 (Fla. 3d DCA 1980). The striking of pleadings or entering a default for noncompliance is the most severe

of all sanctions which should be employed only in extreme circumstances. See Hart v. Weaver, 364 So.2d 524 (Fla. 2d DCA 1978). Default was entered with motions pending which affected litigant's rights to proceed to judgment. See Off Lease Only LLC v. Chariscar, 350 So. 3d 369 (Fla. 4d DCA 2022).

The sanction of dismissal or default requires the subject order should contain an explicit finding of willful noncompliance. See, Commonwealth Fed. Sav. Loan v. Tubero, 569 So. 2d 1271 (Fla.1990). This court's order(s) entering the default (R.283) does not recite any such finding. See Ramos v. Sanchez, 375 So.2d 51 (Fla. 2d DCA 1979).

In that the court relied solely upon Attorney Lippman's false misleading unsworn statements, and matters never sworn or entered into evidence, there is no competent, substantial evidence to support the court's ruling. The erroneous instantaneous default judgment should be vacated, reversed and the case remanded for new trial.

CONCLUSION

Appellant respectfully submits the ultimate decision of the lower tribunal conflicts with the essential elements of law, rules of civil procedure, and authorities herein, such that warrants reversal and remand for further proceedings and a new trial.

Appellant contemporaneously requests oral argument, and written opinion, that this court certify question of great public importance, certify conflict with another district, certify constitutional challenge; that higher court may have valid procedural basis for further review.

CERTIFICATE OF GOOD FAITH

THE UNDERSIGNED HEREBY CERTIFIES this brief and the statements contained are made in good faith, in defense of constitutional rights, not in any willful noncompliance, and not for purpose of delay or frivolous attempt to frustrate adverse judgment. "Good faith is defined as an honest belief…[h]onesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry… It describes that state of mind denoting honesty of purpose… and, generally speaking, means being faithful to one's duty or obligation." See Black's Law Dictionary 623-24 (5th ed. 1979). Appellant rightfully defends against false claims, lawfully challenges the mistake, inadvertence, and fraud of the underlying default judgment in accordance with Rule 1.540.

"A [litigant] shall not disregard… a standing rule of a tribunal made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling." The Florida Bar v. Gersten, 707 So. 2d 711 (Fla. 1998).

Appellant cites Rule Regulating The Florida Bar 4-3.4(c): "A [litigant] shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." The underlying judgment was premature, wrongful, mistaken, obtained by fraud, baseless in fact and ungrounded by procedure. No valid obligation exists. It is fair and just to challenge and test the judgment by (1) acting in good faith and (2) seeking appropriate redress in the appellate court.

CERTIFICATE OF VERIFICATION

WE HEREBY SWEAR, CERTIFY, VERIFY, as follows:

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged are true.

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY, pursuant to Fla. R. App. P. 9.210 to best of self-represented Appellant's knowledge and belief, this filing and appendix complies with applicable font, format, and word count limit requirements.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via e-mail to:

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