IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FOURTH DISTRICT

Case No. 4D24-0572

Lower Tribunal (County Court) Case No. CONO-23-002653

PRIMECARE NETWORK, INC.,

Appellant,

vs.

PAYROLL LLC,

Appellee.

APPELLANT'S INITIAL BRIEF

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INTRODUCTION AND STATEMENT OF THE CASE

This appeal is directed to the trial court's Order Denying Defendant's Motion to Vacate Default and Default Final Judgment (the "Order" or "Order on Appeal"). **(APX A)**. On March 24th, 2023, Appellee, Payroll LLC ("Payroll") filed its complaint against Appellant, Primecare Network Inc. ("Primecare") (the "Complaint"). **(APX B)**. The complaint attached to the Complaint states that Primecare shall pay Payroll 30% of all Employee Retention Credit (ERC) benefits recovered by Primecare. **(APX B)**. On April 11th, 2023, Primecare was served with the Complaint. **(APX C)**. On May 8th, 2023, Payroll filed its motion for default, seeking entry of default by the clerk. **(APX D)**. However, that same day, prior the entry of default by the clerk, Primecare filed a document entitled "Affidavit" which purported to be a response to the Complaint (the "Pro-Se Affidavit"). **(APX E)**. The clerk's default was entered the day after the Response was filed (the "Clerk's Default"). See **(APX D)**.

On May 24th, 2023, a notice of hearing was filed on "Defendant's Motion to Vacate Default"; The matter to be heard on June 6th, 2023. **(APX F)**. Confusingly, at this time, no motion to vacate default had been filed by Primecare, though the trial court

later clarified in the Order that it "treated Defendant's Pro-Se Affidavit as a Motion to Vacate the Default". **(APX A; Paragraph 8)**. On June 6th, 2023, after the hearing on "Defendant's Pro-Se Affidavit", the trial court entered an order which gave Primecare forty-five days to retain a licensed Florida attorney. **(APX G; Paragraph 3)**.

On September 5th, 2023, Payroll filed its "Motion to Strike Defendant's Answer", which is another misnomer, as the motion was directed to Primecare's Pro-Se Affidavit (the "Motion to Strike"). **(APX H)**. In its Motion to Strike, Payroll requested an "Order Striking Defendant's Answer, and … any such other relief to Plaintiff which this Court deems just and proper"). See **(APX H; Wherefore Clause)**. A notice of hearing on the Motion to Strike was filed November 3rd, 2023; the matter to be heard on November 29th, 2023 (the "NOH on Motion to Strike"). **(APX I)**.

In both the Motion to Strike and the NOH on Motion to Strike, counsel for Payroll stated in his certificate of service that each was served upon Primecare via email to soseche@gmail.com and by mail to Primecare's registered agent, Ijeoma Sonny-Exchendu at 514 Dabney Drive, Suite 148, Henderson NC 27536. **(APX H) (APX I)**.

The email address soseche@gmail.com is not the email address listed on the subject contract attached to the complaint, and it is not the email address used by Primecare in any of the communications attached to the Pro-Se Affidavit. **(APX B) (APX E)**. On January 24th, 2024, Primecare filed an Affidavit in Support of Motion to Vacate Default and Default Final Judgment (the "Unopposed Affidavit"), executed by its sole member, who attested that Primecare does not use the email address soseche@gmail.com and that Primecare never received a copy of the Motion to Strike by mail. **(APX J)**. Payroll never filed any opposing affidavit or other proof of mailing the Motion to Strike or NOH on Motion to Strike.

On November 29th, 2023, the trial court entered an order granting the Motion to Strike and entering judicial default against Primecare (hereinafter referred to interchangeably as the "Order on Motion to Strike" or "'Judicial Default'"). **(APX K)**. On December 19th, 2023, Payroll filed its Motion for Default Final Judgment, **(APX L)**. A default final judgment was entered on January 2nd, 2024 (the "Default Final Judgment"). **(APX M)**.

In its Unopposed Affidavit, Primecare stated, *inter alia*, that it never received ERC funds, never received a copy of the Motion to

Strike by mail, and first learned of the Default Final Judgment on or about January 11th, 2024. **(APX J)**. On January 24th, 2024, along with its Unopposed Affidavit, Primecare filed its Motion to Vacate Default and Default Final Judgment (the "Motion to Vacate"), which attached a proposed Answer and Affirmative Defenses. **(APX N)**. Separately, and on that same day, Primecare filed an Answer and Affirmative Defenses, taking the position that because the Clerk's Default, "Judicial Default", and Default Final Judgment were void, any Answer and Affirmative Defenses filed would be timely filed at that juncture. **(APX O)**. Primecare's affirmative defenses were that Payroll failed to satisfy a condition precedent to enforcing the contract, specifically, that because Primecare never received any ERC benefits, no compensation was owed to Payroll, that no cause of action for *quantum meruit* or unjust enrichment exist where there is an express contract, and that Payroll fraudulently misrepresented the payment arrangement in the subject contract to Primecare. **(APX O; pg. 2-3)**.

Primecare's Motion to Vacate was set to be heard on February 7th, 2024. **(APX P)**. A court reporter was present at the hearing and transcribed the proceedings. **(APX Q)**. At the hearing on Primcare's

Motion to Vacate, the trial court rejected Primecare's arguments that the Clerk's Default, "Judicial Default", and Default Final Judgment were void. **(APX A) (APX Q)**. The trial court found that Primecare did raise meritorious affirmative defenses, but that Primecare failed to show excusable neglect or due diligence, and so the trial court ultimately denied the Motion to Vacate on the grounds of excusable neglect. **(APX A) (APX Q)**.

On March 1st, 2024, Primecare filed its Notice of Appeal of Non-Final Order. **(APX R)**.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review the Order on Appeal pursuant to Fla. R. App. P. 9.130(a)(5). See Fla. R. App. P. 9.130(a)(5) ("Orders entered on an authorized and timely motion for relief from judgment are reviewable by the method prescribed by this rule.").

The issues on appeal are: (1) Whether the clerk's default, judicial default, and, consequently, default final judgment are void; and (2) whether, alternatively, the trial court erred in finding that Appellant did not show excusable neglect or due diligence. The first

set of issues is reviewed *de novo*. See *Vercosa v. Fields*, 174 So. 3d 550, 552 (Fla. 4th DCA 2015) ("Whether a judgment is void is a question of law reviewed de novo."). The second set of issues are reviewed under the abuse of discretion standard of review. See *Id.* ("An appellate court ordinarily reviews the denial of a motion to vacate a final judgment under the abuse of discretion standard of review.").

SUMMARY OF THE ARGUMENT

The Order must be reversed for two separate and distinct reasons.

First, the Order must be reversed because the Clerk's Default, "Judicial Default, and, consequently, the Default Final Judgment, are each void for several separate and distinct reasons. The Clerk's Default is void because it was entered after the Pro-Se Affidavit had been filed. In any event, the Clerk's Default was impliedly vacated by the trial court in a June 6th, 2023 order whereby the trial court gave Appellant additional time to retain counsel, and because the trial court later entered a "Judicial Default". The "Judicial Default" is void because the motion upon which "Judicial Default" was entered, i.e., the Motion to Strike, was never served upon Appellant.

This much is established by Appellant's Unopposed Affidavit. Payroll never filed any affidavit or other proof of mailing in opposition to the Unopposed Affidavit. The "Judicial Default" is also void because the relief of judicial default was never applied for by Appellee, and so it was beyond the scope of the pleadings at the time the trial court entered "Judicial Default". Finally, the Default Final Judgment is void because "[a] judgment is void if, in the proceedings leading up to the judgment, there is violation of the due process guarantee of notice and an opportunity to be heard." *Tannenbaum v. Shea*, 133 So. 3d 1056, 1061 (Fla. 4th DCA 2014).

Second, the Order must be reversed because the trial court abused its discretion in finding that Appellant did not show excusable neglect or due diligence, where Appellant's Unopposed Affidavit established each of these elements, and where, with respect to the element of due diligence, the trial court applied the wrong standard.

This Court should reverse the Order and remand with instructions to the trial court to vacate the Clerk's Default, "Judicial Default", and Default Final Judgment so that Appellant may raise its defenses which the trial court did in fact find were meritorious.

This result is consistent with Florida's long-standing policy in favor of deciding lawsuits on their merits. See *North Shore Hosp., Inc. v. Barber*, 143 So.2d 849, 852-53 (Fla. 1962).

ARGUMENT

A. The Clerk's Default is Void Ab Initio Because it was Entered After Primecare Filed its Response.

"Florida Rule of Civil Procedure 1.500(c) provides that '[a] party may plead or otherwise defend at anytime before default is entered.'" *Azure-Moore Investments LLC v. Hoyen*, 300 So.3d 1268, 1270-71 (Fla. 4th DCA 2020); *N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 853 (Fla. 1962) ("[I]f there by any reasonable doubt in the matter [of vacating a default], it should be resolved in favor of granting the application and allowing a trial upon the merits of the case.").

The clerk's default was entered on May 9th, 2023, the day after Primecare filed its response by virtue of the Affidavit. **(APX D)**. The clerk's default was entered improperly after Primecare filed a paper in this action. *Beztak Constr. Co. v. Kesling Carpets, Inc., a Div. of Old Mill Indus., Inc.*, 596 So.2d 1297, 1298 (Fla. 2d DCA 1992) ("Because a default was entered erroneously by the clerk at a

time when [the defendant] had, in fact, served papers in the cause, there was no requirement that [the defendant] establish excusable neglect, a meritorious defense, or due diligence.") (emphasis added)(citation omitted); *Carr v. Butler*, 590 So.2d 508, 509 (Fla. 4th DCA 1991) ("While it may be true that appellant did not timely file a pleading responsive to the cross-claim upon which default was entered, he had previously filed several documents in the case.") The key terminology in Florida Rule of Civil Procedure 1.500(a) is "any document". Primecare anticipates the following counterargument: Because Primecare was not authorized to file a response to the Complaint *pro se*, being a corporate entity, Primecare should be treated as though it failed to file any document. This argument must be rejected. Primecare's Pro-Se Affidavit is, in the plainest and truest sense of the word, a "document".

As such, the clerk's default is *void ab initio*. *Lannquist v. Munyon*, 307 So. 3d 782 (Fla. 4th DCA 2020) ("Because an improperly entered clerk's default is void ab initio[.]"); *DeRosa v. Pugliese*, 782 So. 2d 1011, 1011 (Fla. 4th DCA 2001) ("[T]he clerk's

default was void ab initio because appellants served their answer and affirmative defenses before the clerk entered its default.").

In any event, the Clerk's Default was impliedly vacated by the trial court in a June 6th, 2023 order whereby the trial court gave Primecare additional time to retain counsel, and because the trial court later entered a "Judicial Default". **(APX G) (APX K)**.

B. The "Judicial Default" is *Void Ab Initio* Because the Undisputed Evidence Demonstrates that Payroll Failed to Give Notice to Primecare.

"A final judgment is void where the notice of hearing that resulted in the judgment was sent to an incorrect address and, as a result, the defendant failed to receive notice." *Greisel v. Gregg*, 733 So.2d 1119, 1121 (Fla. 5th DCA 1999).

Although Appellee certified in its Motion to Strike that the Motion to Strike was served upon Appellant, Appellant never received a mailed copy of the Motion to Strike. **(APX H) (APX J)**.

Moreover, the email to which Appellee certified it sent the Motion to Strike was not registered by Appellant with the trial court and is not the email used on the Contract. **(APX H)**. Appellant does not use the email to which Appellee certified it sent the Motion to

Strike. **(APX J)**. Neither did Appellant receive the notice of hearing on the Motion to Strike by mail. **(APX J)**.

Had Appellee filed an affidavit in opposition to Appellant's Unopposed Affidavit, perhaps the trial court could have reasonably made the finding that Appellant did in fact receive notice of the Motion to Strike and notice of hearing on same; However, because the Unopposed Affidavit was the only evidence before the trial court, the trial court was required to vacate the "Judicial Default" as void ab initio.

C. The "Judicial Default" is Void Ab Initio Because the Entry of Judicial Default was Beyond the Scope of the Pleading Before the Trial Court.

"If a court enters an order prior to the filing of proper pleadings, the court is said to lack jurisdiction." *U.S. Bank Nat. Ass'n v. Anthony-Irish*, 204 So. 3d 57 (Fla. 5th DCA 2016) (citing *Lovett v. Lovett*, 93 Fla. 611, 112 So. 768, 775–76 (1927)). "Likewise, if a court grants relief beyond the scope of the pleadings, it acts in excess of its jurisdiction." *Id.* (citing *Fine v. Fine*, 400 So.2d 1254, 1255 (Fla. 5th DCA 1981) ("The jurisdiction of the court can be exercised only within the scope of the pleadings....").

Absent throughout Payroll's Motion for Strike is any request for the entry of judicial default. **(APX H)**. Yet, at the November 29th, 2023, hearing on Payroll's Motion to Strike, the trial court entered the Order on Motion to Strike, which included an entry of "judicial default" against Primecare, relief which is plainly beyond the scope of Payroll's Motion to Strike. **(APX K)**. Thus, the Order on Motion to Strike, to the extent it includes the entry of judicial default against Primecare, is void. *Dragomirecky v. Town of Ponce Inlet*, 891 So.2d 633, 634 (Fla. 5th DCA 2005) ("an order entered without jurisdiction is a nullity, and cannot be considered harmless error."); *Garcia-Lawson v. Lawson*, 82 So.3d 137, 137 (Fla. 4th DCA 2012) ("[J]urisdiction is not a question a court can take or leave, and a judgment entered without jurisdiction is void.) (quoting *Esposito v. Horning*, 416 So.2d 896, 898 (Fla 4th DCA 1982).

This case is similar to *Shah v. Shah*, 178 So. 3d 70 (Fla. 3d DCA 2015). In *Shah*, a hearing was noticed as a status conference, yet a final hearing was conducted, and the Third District determined that this violated due process. See *Id.* at 71 ("The trial court's July 30, 2014 notice of hearing notified the parties that if an answer to the petition had been filed, the hearing would serve as a

status conference rather than a final hearing. The trial court, however, changed the nature and expanded the scope of the scheduled hearing without proper notice. In so doing, the court violated the wife's due process rights.") (emphasis added).

D. To the Extent the Clerk's Default and "Judicial Default" are *Void Ab Initio*, Primecare Need Not Demonstrate Excusable Neglect or a Meritorious Defense.

Because the Clerk's Default and "Judicial Default" are void, the Default Final Judgment is also void. *Tannenbaum v. Shea*, 133 So. 3d 1056, 1061 (Fla. 4th DCA 2014) ("A judgment is void if, in the proceedings leading up to the judgment, there is violation of the due process guarantee of notice and an opportunity to be heard."). As a result, Appellant need not demonstrate excusable neglect or any meritorious defense. *Hendrix v. Dep't Stores Nat. Bank*, 177 So.3d 288, 290 (Fla. Dist. Ct. App. 2015) ("If a judgment is void, a party is not required to demonstrate excusable neglect or a meritorious defense.").

E. In the Alternative to Arguments A, B, and C, the Trial Court Abused its Discretion in Denying the Motion to Vacate Based on Primecare's Excusable Neglect.

Alternatively, if this Court holds that either the Clerk's Default or "Judicial Default", or both, are not void, the trial court plainly abused its discretion in determining that Primecare failed to establish excusable neglect and due diligence.

Florida has a long-standing policy in favor of deciding lawsuits on their merits; defaults are disfavored. See *North Shore Hosp., Inc. v. Barber*, 143 So.2d 849, 852-53 (Fla.1962); *Markowski v. Attel Bank Int'l.*, 701 So.2d 416, 417 (Fla. 3rd DCA 1997). Thus, if there be any reasonable doubt in the matter [of vacating a default], it should be resolved in favor of granting the application and allowing a trial upon the merits of the case. *North Shore*, 143 So.2d at 853 (citations omitted); see also *Apolaro v. Falcon*, 566 So.2d 815, 816 (Fla. 3* DCA 1990).

Florida Rule of Civil Procedure l.500(d) provides that the court may set aside a default judgment in accordance with section 1.540(b) of those rules. (2019). Florida Rule of Civil Procedure 1.540(b) states, in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree,

> order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; …

(2023) (emphasis added).

Pursuant to Florida Rule of Civil Procedure 1.540(b), in order to set aside a default a party needs to demonstrate three things: 1) excusable neglect for failing to file a timely responsive pleading; 2) that a meritorious defense exists; and, 3) that the defaulted party has sought to vacate the default with reasonable diligence after it was discovered. *Jacksonville, LLC v. A-Affordable Air, LLC*, 16 So.3d 974, 974 (Fla. 3d DCA 2009); *Emmer v. Brucato*, 813 So.2d 264, 265 (Fla. 5th DCA 2002); *Moore v. Powell*, 480 So.2d 137, 139 (Fla. 4th DCA 1985); et al.

At the hearing on Primecare's Motion to Vacate, the trial court found that there existed a meritorious defense, but that Primecare failed to demonstrate excusable neglect and due diligence.

i. Primecare Demonstrated Excusable Neglect.

Perhaps if Primecare would have received notice of the hearing on the Motion to Strike, Primecare would have promptly secured counsel. But, as set forth in Primecare's Unopposed Affidavit, Primecare did not receive any such notice. **(APX J)**. Primecare first

learned of the Default Final Judgment on or about January 11th, 2024. **(APX J)**. Primecare secured counsel promptly thereafter, to wit, twelve (12) days later, a factor to be considered favorably when determining whether a party has demonstrated excusable neglect. **(APX J)**; *See B.C. Builders Supply Co. v. Maldonado*, 405 So.2d 1347, 1348 (Fla. 3d DCA 1981); *see also Miami-Dade County v. Coral Bay Section C Homeowners Association, Inc.*, 979 So.2d 318, 324 n.2 (Fla. 3d DCA 2008) (citing *B.C.*, 405 So.2d at 1348). Ultimately, it is Payroll's failure to provide adequate notice of an imminent judicial default - both by failing to send notice to Primecare and by failing to specify that it was seeking that kind of relief in its Motion to Strike - that gave rise to Primecare's excusable neglect in securing counsel prior to the entry of the "Judicial Default". Primecare maintains however that Payroll's failure to provide adequate notice to Primecare is first and foremost a procedural due process issue that voids the "Judicial Default" and renders superfluous any discussion of the excusable neglect that such procedural due process issues cause.

ii. Primecare Demonstrated Due Diligence.

Where seeking to set aside a clerk's default or default final judgment, a party must demonstrate that *once it was aware of the default*, it exercised due diligence in undoing the default. *Jacksonville*, 16 So.3d at 974; *Emmer*, 813 So.2d at 265; *Moore*, 480 So.2d at 139; et al. Whether a party acted diligently in setting aside a default is a matter to be determined by the surrounding circumstances of the matter. See *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So.2d 300, 303-04 (Fla. 2d DCA 2004).

In *Allstate*, the court found that a seven-week delay did not constitute due diligence where the defendant in question was a sophisticated business that regularly handled lawsuits and was well-aware of the legal consequences of failing to respond to a lawsuit. 890 So.2d 300 at 302-04. In this case, Primecare, an out-of-state corporate entity, does not regularly handle lawsuits and the amount of delay before moving to vacate the default final judgment was negligible, a matter of 13 days. Primecare, as such, acted with due diligence in setting aside the default judgment in this matter. See *id.*

In finding that Primecare did not demonstrate due diligence, the trial court placed importance on its belief that Primecare

ignored and disregarded the trial court's order to obtain counsel within forty-five (45) days of June 6, 2023. See Paragraph 6 of the Order on Appeal (APX A). In so doing, the trial court neglected to consider that the standard in determining due diligence is whether a party acted diligently "subsequent to learning of the default". *Halpern v. Houser*, 949 So.2d 1155, 1157 (Fla. 4th DCA 2007) (citing *Schwartz v. Bus. Cards Tomorrow, Inc.*, 644 So.2d 611, 611 (Fla. 4th DCA 1994)).

The Fourth District has found that a delay of 39 days for hired counsel to investigate a claim, prepare documents related to vacating a default, and to file a motion to vacate a default constituted due diligence. *Florida Eurocars, Inc. v. Pecorak*, 110 So.3d 513 (Fla. 4th DCA 2013).

As such, the trial court abused its discretion in finding that Primecare failed to exercise due diligence.

CONCLUSION

Primecare never received any benefit from Payroll pursuant to the contract which is the subject of this case. By violating Primecare's procedural due process rights and by failing to apply the correct standard with respect to "excusable neglect", Payroll and

the trial court, respectively, have caused an over $25,000.00 judgment to be entered against an entity who received nothing from its dealings with Payroll, where recovery in any breach of contract action was expressly contingent upon Primecare receiving a benefit under the subject contract.

WHEREFORE, for the foregoing reasons, it was error for the trial court to enter the Order on Appeal, and Appellant seeks reversal thereof, and for any and all other relief deemed adequate by this Fourth District Court of Appeal, including an award of attorneys' fees and costs in favor of Appellants.

CERTIFICATE OF COMPLIANCE

Appellants' counsel hereby certifies that this Initial Brief is in compliance with the font requirements of Fla. R. App. P. 9.210, including being in Bookman Old Style font, size 14, and certifies that the Initial Brief is 3,661 words long.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished via the Florida e-filing portal on this 15th day of March 2024 to the following:

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