IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

PEGGY WARD

CASE NO.: CVA1 06-46
LOWER COURT CASE NO.:
06-CC-3986

Appellant,

v.

RAK CHARLES TOWNE LIMITED
PARTNERSHIP AND STERLING
MANAGEMENT,

Appellee.
_____/

Appeal from the County Court
for Orange County,
Deb Blechman, Judge.

Debi V. Rumph, Esq., on behalf of Appellant.

Dale T. Gobel, Esq., on behalf of Appellee.

Before KIRKWOOD, WHITE and RODRIGUEZ, J.J.

PER CURIAM.

ORDER AFFIRMING THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO VACATE DEFAULT JUDGMENT AND WRIT OF POSSESSION

Appellant, Peggy Ward, timely appeals the trial court's order denying her "Emergency Amended Motion to Vacate Default Judgment and Writ of Possession." This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(ii).

I. FACTS

Appellant signed a six month lease for an apartment home with Appellee, Rak Charles Towne Limited Partnership and Sterling Management, beginning on July 1, 2005. Under the lease, Appellant was obligated to pay rent in the amount of $1,024.00 per month. Shortly after the lease was signed, Appellant received notice of Appellee's intent to convert the apartment to a condominium. Pursuant to section 718.606, Florida Statutes, the notice also provided Appellant

with an opportunity to extend the lease for 270 days. Appellant subsequently informed Appellee in writing of her intent to extend the lease.

On October 28, 2005, Appellant sent a letter to Appellee outlining various complaints and issues with her apartment. On February 5, 2006, Appellant sent another letter concerning Appellee's failure to adequately address the discoloration of one of her living room walls. In this letter, Appellant stated that she would hire a professional painter to fix the problem and was deducting the estimated cost of the repair from the rent due that month. Accompanying the letter was the balance of the rent, $424.00. Appellee apparently rejected the partial payment and after Appellant failed to remit the rent due for March 2006, filed a complaint for eviction.

After being served with the complaint, Appellant paid $3,125.28 into the registry of the court, representing the rents for the months of February, March, and April 2006. On June 8, 2006, Appellee served a notice cancelling a hearing on its motion to dismiss and motion to strike jury trial because the parties had reached a settlement the prior day. Notwithstanding this apparent "settlement," Appellee filed a "Motion for Immediate Default Judgment as to Possession" for Appellant's failure to deposit the rent monies for the months of May and June into the court registry on June 23, 2006. Three days later, the lower court granted Appellee's motion and issued a writ of possession.

After learning of the court's order, Appellant successively filed a "Motion to Vacate Default Judgment," "Amended Motion to Vacate Default Judgment and Writ of Possession," and an "Emergency Amended Motion to Vacate Default Judgment and Writ of Possession." (R. 73-78.) The lower court denied Appellant's motion to vacate the default. After her motions for a new trial and reconsideration were denied, this appeal followed.

II. STANDARD OF REVIEW

A trial court has broad discretion in determining whether the facts warrant vacating a default. *Tire Kingdom, Inc. v. Bowman*, 480 So. 2d 221 (Fla. 5th DCA 1985). When reviewing a trial court's refusal to vacate a default, it must be shown that the trial court grossly abused its discretion. *Id.* at 222. Normally, an abuse of discretion cannot be shown absent a transcript of the proceedings. *See Ezell v. Century 21 of Se., Inc.*, 615 So. 2d 273, 275 (Fla. 5th DCA 1993). However, a court may reverse a judgment where an error of law is apparent on the face of the judgment. *Poling v. Palm Coast Abstract & Title, Inc.*, 882 So. 2d 483, 484 (Fla. 5th DCA 2004).

III. DISCUSSION

Appellant has raised seven (7) arguments in support of overturning the lower court's order. Some of these arguments are overlapping and are consolidated as follows: 1) public policy requires the default judgment be vacated; 2) the parties' settlement agreement precluded a default from being entered; 3) Appellee was required to obtain an order that monies be deposited into the court registry prior to obtaining a default; 4) a default could not have been entered because it did not afford the parties full and complete relief; and 5) Appellant's Due Process rights were violated because she never received a copy of the notice of application for default or the hearing thereon. Appellant's arguments, with the exception of her second argument, can be rather quickly disposed of.

Appellant first argues that equity demands the default be vacated because of the adverse consequences it will have on her credit and because she paid the past due rents into the registry upon learning that Appellee asserted there was no settlement agreement. This argument is belied by the fact that Appellant admittedly knew that Appellee had filed a "Final Eviction Hearing on Possession for June 26, 2006." (IB 6.) Upon learning that Appellee had scheduled a final hearing for eviction, Appellant could not have realistically believed that the parties were operating under a settlement agreement. Consequently, Appellant was statutorily obligated to pay the past due rents for May and June in order to maintain possession of her apartment upon learning of the final hearing for eviction. *See* § 83.60, Fla. Stat. (2006)[1]; *First Hanover v. Vazquez*, 848 So. 2d 1188, 1190 (Fla. 3d DCA 2003) (payment of rent into the court registry is a condition precedent to remaining in possession of the leased premises). However, Appellant admittedly did not deposit the rents due for May or June until after learning of the default judgment for possession. Appellant's failure to deposit the rents entitled Appellee to an

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[1] In relevant part, section 83.60(2), Florida Statutes states,

> In an action by the landlord for possession . . . 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 which accrues during the pendency of the proceeding, when due. The clerk shall notify the tenant of such requirement in the summons. Failure . . . to pay the rent into the registry of the court . . . 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 with a writ of possession to issue without further notice or hearing thereon.

immediate default judgment and a writ of possession. *See* § 83.60, Fla. Stat. There is no language in section 83.60, Florida Statutes, that grants a trial court any discretion to excuse noncompliance with its provisions. This conclusion is bolstered by the court's decision in *Main Street Corp. v. Tanksley*, 947 So. 2d 490 (Fla. 2d DCA 2006).

In *214 Main Street Corp. v. Tanksley*, 947 So. 2d 490, the court reversed the trial court's decision to vacate a default judgment and writ of possession based on a showing of excusable neglect in paying rent late into the court registry. Relying on the plain terms of section 83.232(5), Florida Statutes, the court concluded that the terms of the statute were absolute and therefore, the trial court did not have the discretion to excuse late payment of rent into the court registry. *Id.* at 492. Although *214 Main Street Corp. v. Tanksley*, dealt with section 83.232, Florida Statutes, which applies to non-residential tenancies, the court's analysis is nonetheless quite instructive to the case at bar.

Section 83.232, Florida Statutes (2006), requires a non-residential tenant to pay both unpaid and accruing rent as ordered by the court into the registry of the court. If the tenant fails to pay the rent into the court registry, "the landlord is entitled to an immediate default for possession" without further notice or a hearing. § 83.232(5), Fla. Stat. This language is quite similar to section 83.60(2), Florida Statutes, which provides that if a tenant fails to pay rent into the registry of the court "the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession" without further notice or a hearing. Accordingly, based on the plain language of section 83.60, Florida Statutes, and *214 Main Street Corp. v. Tanksley*, 947 So. 2d 490, the Court rejects Appellant's first argument.

Appellant's third argument that Appellee was required to move the court to order Appellant to deposit monies into the court registry directly conflicts with the plain terms of section 83.60, Florida Statutes. Appellant's obligation to deposit the rents into the court registry began when the summons was served upon her. *See* § 83.60(2) Fla. Stat. When Appellant failed to pay rents into the court registry, Appellee was entitled to an immediate default judgment along with a writ of possession. *Id.* This could be issued without affording Appellant notice or a hearing, contrary to Appellant's fifth argument. *Id.*

In support of her fourth argument, Appellant cites *Freeman v. Geiger*, 314 So. 2d 189 (Fla. 3d DCA 1975), for the proposition that a default for possession cannot be entered where it fails to provide the parties with full and complete relief. However, the court in *K.D. Lewis*

Enterprises Corp. v. Smith, 445 So. 2d 1032, 1036 (Fla. 5th DCA 1984), limited *Freeman v. Geiger*, to its facts and specifically rejected the argument that a default judgment for possession could not be entered "any time a claim for possession is opposed by a counterclaim." In any event, a default judgment for possession does not foreclose Appellant's ability to proceed with her counterclaim, only her ability to maintain possession of the premises. *See Hanover v. Vazquez*, 848 So. 2d at 1191. As such, this argument is utterly unpersuasive.

Finally, this Court addresses Appellant's argument that the default should not have been entered because of an alleged settlement agreement entered into between the parties. Appellant argues that the court was required to hold an evidentiary hearing upon being notified that the parties had reached a settlement. Appellant also argues that Appellees waived its right to obtain a default based on the settlement agreement. Lastly, Appellant contends that her reliance on the settlement agreement constituted a mistake, surprise, or excusable neglect sufficient to vacate the default. These arguments need not be addressed individually because the Court does not find that a settlement agreement existed at all.

Contrary to Appellant's contention, the trial court did not need to hold an evidentiary hearing because the parties never placed or attempted to place the terms of the purported settlement agreement in the record. *See Long Term Mgmt., Inc. v. Univ. Nursing Care Ctr., Inc.*, 704 So. 2d 669 (Fla. 1st DCA 1997) (oral settlement agreement enforceable where its terms were announced to the trial court); *Farrell v. Farrell*, 661 So. 2d 1257 (Fla. 3d DCA 1995) (settlement agreement which was transcribed by court reporter and filed with the court enforceable). Other than Appellee's notice of cancelling a hearing which indicated that the parties had reached a settlement, there is no record evidence that any terms of a purported settlement agreement was presented to the trial court prior to the default judgment and writ of possession being entered.[2] In fact, the trial court's order stated, "[t]he Court has not seen this settlement agreement, nor does the Court know if Plaintiff bound itself to wait until June 27th for June rent." (R. 80.) Absent any evidence of a binding settlement agreement, there simply is no basis to find that the trial court erred in ordering the default judgment and writ of possession.

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[2] It is apparent that the parties did not finalize any purported settlement agreement because Appellant refused to sign a release sent by Appellee due to its failure to "reflect the parties' settlement agreement." (IB 6.) Also, as previously noted, upon learning that Appellee filed a final hearing for eviction, Appellant had to have known that Appellee did not believe there was a binding settlement agreement.

Based on the foregoing, the Court rejects Appellant's arguments that the trial court erred in vacating the default judgment and writ of possession.

APPELLEE'S MOTION FOR ATTORNEY'S FEES

Appellee has moved for an award of attorney's fees pursuant to Florida Rule of Appellate Procedure 9.300 and section 57.105, Florida Statutes. Appellee served its motion and stated the basis for such an award as required by Rule 9.300(b): a provision in the lease agreement providing for the recovery of attorney's fees in an action enforcing or defending the lease. Accordingly, Appellee's motion is granted and remanded to the trial court to determine what costs and fees are appropriate.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the trial court's June 28, 2006, denying Appellant's Emergency Amended Motion to Vacate the Default Judgment and Writ of Possession is **AFFIRMED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this 30 day of October, 2007.

_/S/_____
LAWRENCE R. KIRKWOOD
Circuit Judge

__/S/_____
ALICE L. BLACKWELL
Circuit Judge

___/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to: **Debi V. Rumph**, **Esq.**, P.O. Box 541593, Orlando, Florida 32854-1593; **Dale T. Gobel, Esq.**, de Beaubien, Knight, Simmons, Mantzaris & Neal, L.L.P., 332 North Magnolia Avenue, P.O. Box 87, Orlando, Florida 32802-0087 on this 30 day of ___October_____, 2007.

_____/S/_____
Judicial Assistant