

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

WESLEY BUSH,

Appellant,

v.

CASE NO.: CVA1 07-70

Lower Court Case No.: 2007-CC-13472

ALFREDO and CLARA WESTON,

Appellees.

An appeal from the County Court,
for Orange County,
Antoinette Plogstedt, Judge.

Michael L. Resnick, Esquire,
for Appellant.

Bill McCabe, Esquire,
For Appellees.

Before LEBLANC, KIRKWOOD, and MACKINNON, JJ.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING TRIAL COURT

Appellant Wesley Bush (Bush) timely appeals the trial court's final judgment of possession and related orders in favor of Appellees Alfredo and Clara Weston (Westons). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument per Florida Rule of Appellate Procedure 9.320.

The Westons filed a tenant eviction action against Bush on August 28, 2007, for nonpayment of rent for the months of February, March, April, May, June, July, and August 2007. The complaint stated that Bush was served with a notice on June 11, 2007, but Bush refused to pay rent or deliver the premises. On September 10, 2007, Bush filed a pro se answer and

attached money order receipts dated February 27, 2007, April 21, 2007, and June 25, 2007. Bush also filed a motion to have the court determine the amount of rent to be paid.

On September 17, 2007, the trial court entered a default against Bush because the answer: (1) did not allege that the rent claimed to be due had been paid; (2) did not reflect that any rent payment had been deposited with the clerk; and (3) did not request a hearing to determine the amount of rent to deposit into the court registry or alternatively, if requested, did not attach documentation in support of the motion. The trial court also entered a final judgment in favor of the Westons as to possession but reserved jurisdiction as to damages.

On or about September 19, 2007, Bush filed another answer as to count II and a motion to set aside the default. The next day, Bush, through legal counsel, filed another motion to set aside default, final judgment, and writ of possession, arguing that his answer alleged payment of rent for the months at issue and that the court's default was improper because Bush was not required to pay money into the court registry or in the alternative, Bush filed a motion to determine rent. Bush also asserted that Weston & Weston Property Partnership was the legal owner of the real property in question, not the Westons, individually.

Upon receiving the trial court's order denying Bush's motion to set aside default, final judgment, and writ of possession, Bush filed an amended motion for rehearing arguing standing and the constitutionality of section 83.60(2), Florida Statutes. The trial court promptly entered an order denying the motion for rehearing. This appeal followed.

Where a trial court's decision rests on a pure matter of law that can be evaluated equally as well by the appellate and trial courts, the standard of review is de novo. Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376 (Fla. 5th DCA 1998)(judicial interpretation of state statutes is a purely legal matter and therefore subject to de novo review).

This appeal pertains to a residential eviction for nonpayment of rent governed by Chapter 83, Florida Statutes. Specifically, section 83.60(2), Florida Statutes, which states that:

In an action by the landlord for possession of a dwelling unit, if the tenant interposes any defense other than payment, the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent which accrues during the pendency of the proceeding, when due. The clerk shall notify the tenant of such requirement in the summons. Failure of 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 into the registry within 5 days, excluding Saturdays, Sundays, and legal holidays, after the date of the service 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. In the event a motion to determine rent is filed, documentation in support of the allegation that the rent as alleged in the complaint is in error is required.

Pursuant to section 83.59(2), Florida Statutes, a landlord is entitled to summary procedure as provided for in Chapter 51, Florida Statutes. The purpose of Chapter 51 is to provide an expedited process to determine the right to possession of property promptly without the necessity of deciding all other issues between the parties. Camena Inv. & Prop. Mgmt. Corp. v. Cross, 791 So. 2d 595, 596 (Fla. 3d DCA 2001). To carry out this purpose, section 51.011(1), Florida Statutes, provides that “[a]ll defenses of law or fact shall be contained in defendant’s answer which shall be filed within 5 days after service of process of plaintiff’s initial pleading.”

Bush argues that the trial court erred by failing to make a determination as the Westons’ standing to bring the eviction action before requiring Bush to deposit rent money into the court registry. Bush also argues that the trial court erred in failing to declare as unconstitutional the rent deposit provisions of section 83.60(2), Florida Statutes, pursuant to the Due Process Clause

of the Fourteenth Amendment to the United States Constitution; Article I, Section 21, of the Florida Constitution; and Article V, Section 2, of the Florida Constitution.

Alternatively, the Westons assert that they had standing to bring an eviction action and the trial court was not required to determine standing before requiring Bush to deposit rent money into the registry. The Westons also assert that this Court should find the rent deposit provisions of section 83.60(2), Florida Statutes, constitutional because it has previously been found constitutional by other courts.

Standing

Bush states that according to the Public Records of Orange County, Florida, and the Orange County Property Appraiser's Office, the Westons are not the owners of the property at issue, but rather Weston & Weston Property Partnership, a Florida General Partnership, is the owner. Based on these records of ownership, Bush argues that the Westons lacked standing to bring an action for possession against Bush pursuant to the provisions of Chapter 83, Part II, Florida Statutes, and the trial court erred in failing to make a determination as to such standing before requiring Bush to deposit rent money into the court registry. On the other hand, the Westons maintain that they had standing to bring the eviction action as individuals because a partnership is not required to sue or be sued in the name of the partnership.

Pursuant to sections 689.045(3) and 620.8307(1), Florida Statutes, a general partnership can hold title to real property and a general partnership "may" sue or be sued in the name of the partnership. It is undisputed that Weston & Weston Property Partnership owns the property at issue. It is also undisputed that the partners of Weston & Weston Property Partnership are the Appellees, Alfredo Weston and Clara Weston. In Ralston, Inc. v. Miller, the appellate court noted that "[t]he word 'may', when given its ordinary meaning, denotes a permissive term rather

than the mandatory connotation of the word “shall.” 357 So. 2d 1066, 1070 (Fla. 3d DCA 1978). Accordingly, this Court finds that the Westons, as partners in the general partnership, had standing to bring this action in their individual names and were not required to bring the action in the name of the partnership. Moreover, because the issue of standing was not raised until after the entry of the final judgment, the trial court was not required to address standing before requiring Bush to deposit rent money into the court registry.

Constitutionality of Section 83.60(2), Florida Statutes

Bush asserts that the trial court erred in failing to declare as unconstitutional the rent deposit provisions of Section 83.60(2), Florida Statutes, pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution; Article I, Section 21, of the Florida Constitution; and Article V, Section 2, of the Florida Constitution. Alternatively, the Westons argue that Section 83.60(2), Florida Statutes, is constitutional under all grounds.

Bush first argues that the rent deposit provisions of section 83.60(2), Florida Statutes, are a violation of his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Bush asserts that such denial of due process is the result of the statute prohibiting him from alleging defenses to the eviction action that would ordinarily result in a dismissal absent the rent deposit requirements of section 83.60(2), Florida Statutes.

“The essence of due process is that a litigant must have the opportunity to present every available defense.” Berman v. Pino, 8 Fla. L. Weekly Supp. 403a (Fla. 9th Cir. Ct. Nov. 13, 2000)(citing American Surety Co. v. Baldwin, 287 U.S. 156 (1932)). In Berman, this court, in its appellate capacity, held that the mandatory rent deposit provisions of section 83.60(2), Florida Statutes, were unconstitutional and a violation of the Due Process Clause of the Fourteenth Amendment because the provisions impose an absolute waiver of a tenant’s defenses to an

eviction action, including those defenses that would ordinarily result in a dismissal. Berman, 8 Fla. L. Weekly Supp. 403. However, unlike the tenant in Berman, who raised defenses other than payment at the time of filing the answer, Bush did not raise any defense other than payment until after the entry of the final judgment. Given this and other factual differences between Berman and the instant case, this Court finds that its prior holding in Berman is inapplicable to the instant case. Furthermore, it should be noted that other courts have held that tenants in an eviction action for nonpayment of rent are obligated to pay rent as a condition to remaining in possession of the property, irrespective of their defenses and counterclaims. First Hanover v. Vazquez, 848 So. 2d 1188, 1190 (Fla. 3d DCA 2003); K.D. Lewis Enterprises Corp., Inc. v. Smith, 445 So. 2d 1032, 1035 (Fla. 5th DCA 1984). Therefore, this Court finds that Bush's due process argument is misplaced and his cited authority is inapplicable to the instant case.

Bush next argues that the rent deposit provisions of section 83.60(2), Florida Statutes, are an unconstitutional denial of his right to access to the courts as guaranteed by Article I, Section 21, of the Florida Constitution.

Article I, Section 21, of the Florida Constitution provides that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.” This constitutional provision governing access to courts is violated if a statute obstructs or infringes that right to any significant degree. See Mitchell v. Moore, 786 So. 2d 521, 525 (Fla. 2001).

In the instant case, Bush's access to the court was not infringed upon or obstructed. It is undisputed that Bush failed to pay the accrued rent for September 2007 and the only defense raised in his answer was payment of the disputed rent. As previously addressed, requiring a tenant to deposit accrued rent into the court registry in order to remain in possession during the

litigation is not violative of any of the asserted constitutional rights. See First Hanover, 848 So. 2d 1188, 1190. Bush was not prohibited from asserting defenses, rather, he failed to do so in his answer and did not attempt to timely amend his answer.

Lastly, Bush argues that the rent deposit provisions of section 83.60(2), Florida Statutes, are an impermissible intrusion upon the Florida Supreme Court's rulemaking authority as provided for in Article V, Section 2, of the Florida Constitution, because the provisions prohibit a court from addressing issues of standing, jurisdiction, or alleged failure to state a cause of action until such time as rent money is deposited into the court registry.

Article V, Section 2(a), of the Florida Constitution, provides that the Florida Supreme Court shall adopt rules for the practice and procedure in all courts. In determining whether a statute infringes upon this rulemaking authority, a determination must be made as to whether the statute is substantive or procedural. Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 53 (Fla. 2000).

In support of this argument, Bush again cites to Berman, where this court, in its appellate capacity, found section 83.60(2), Florida Statutes, to be an impermissible intrusion upon the Florida Supreme Court's rulemaking authority. 8 Fla. L. Weekly Supp. 403a (Fla. 9th Cir. Ct. 2000). In Berman, the tenant filed affirmative defenses and a motion to dismiss along with his answer but the trial court entered a default and final judgment for possession in favor of the owner because the tenant failed to deposit rent monies into the court registry as ordered before the mediation. Id. We find that this argument and Bush's cited authority is inapplicable to the instant case.

Accordingly, when the rent deposit provisions of section 83.60(2), Florida Statutes, are applied to the instant case and analyzed under Bush's constitutional arguments, such provisions

did not result in a violation of due process rights, a denial of one's right to access the courts, or an intrusion upon the Florida Supreme Court's rulemaking authority. Therefore, this Court finds that section 83.60(2), Florida Statutes, is constitutional as it relates to the instant case.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's final judgment of possession and related orders are **AFFIRMED**; Appellee's Motion for Attorney's Fees is **GRANTED**, the assessment of which is **REMANDED** to the trial court; and this case is **REMANDED** for further proceedings consistent with this opinion.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this
12 day of _March_, 2009.

/S/
BOB LEBLANC
Circuit Court Judge

/S/
LAWRENCE KIRKWOOD
Circuit Court Judge

/S/
CYNTHIA Z. MACKINNON
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Michael L. Resnick, Esquire**, Legal Aid Society of the Orange County Bar Association, Inc., 100 E. Robinson Street, Orlando, Florida 32801 and **Bill McCabe, Esquire**, 1450 SR 434 West #200, Longwood, Florida 32750 on this _12_ day of _March_, 2009.

/S/
Judicial Assistant