

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

MARLENE A. KERNBERGER,

Appellant,

vs.

CHASE BANK USA, N.A.,

Appellee.

CASE NO. CVA1 07-91

County Court Case No. 2007-CC-11341-O

Appeal from the County Court,
For Orange County,
Jerry A. Brewer, Judge

Marlene A. Kernberger, pro se,
for Appellant.

Phillip A. Orsi, Esquire,
for Appellee.

Before POWELL, BLACKWELL, T. SMITH, J.J.

PER CURIAM.

FINAL ORDER REVERSING LOWER COURT

Under the facts of this case, we find that the trial court abused its discretion in entering a final default judgment against defendant/appellant Kernberger for her failure to attend a court-ordered mediation conference. Especially is this so where she had filed a verified answer and affirmative defenses, and, six days prior to the mediation conference, had filed a petition to stay mediation and supporting brief before the conference was to take place.¹ If Kernberger should

¹ In retrospect, had Kernberger had an attorney, the attorney would have contacted the Judge's legal assistant, scheduled the petition to stay for hearing prior to the mediation conference, and served a copy with the notice of hearing on opposing counsel. Or, in the alternative, Kernberger and her attorney could have simply attended the mediation conference where she could have stuck by her position that she would not settle but wanted a trial. Unfortunately, due to her representing herself and her lack of experience, she did neither.

have been sanctioned at all, a less severe sanction of admonishment or award of mediator's and attorney's fees would have sufficed. *See Williams v. Udell*, 690 So. 2d 732 (Fla. 4th DCA 1997) (striking appellant's pleadings for failure to attend a mediation conference and failure to properly respond to a discovery request too severe a sanction); *Corbino v. Ward*, 801 So. 2d 1028 (Fla. 5th DCA 2001)(*Fla. R. Civ. P. 1.720* mandated imposition of mediator's costs and attorney's fees against party who failed to appear at mediation conference without good cause); *Segui v. Margrill*, 844 So. 2d 820 (Fla. 5th DCA 2003)(granting appellant's motion for sanctions and imposing mediator's costs and appellate attorney's fees where party failed to appear at court-ordered appellate mediation conference). Dismissal of a plaintiff's claim or entry of final default judgment against a defendant is an ultimate sanction, reserved for the most aggravated circumstances where no lesser sanction would be appropriate. *See Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993). Application of the *Kozel* factors resolve in Kernberger's favor.

Consequently, the final default judgment is **REVERSED** and this case is **REMANDED** for further proceedings. On remand the case should be heard by a different county judge, who is directed to schedule and notice a hearing on appellant's petition to stay mediation before proceeding further. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida this
____ 18 ____ day of _____ August _____, 2009.

_____/s/_____
ROM W. POWELL
Senior Judge

_____/s/_____
ALICE L. BLACKWELL
Circuit Judge

_____/s/_____
THOMAS B. SMITH
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 to: **Marlene Kernberger**, 3287 Amaca Circle, Orlando, Florida 32837 and **Philip Orsi, Esquire**, JPMorgan Chase-Legal Department, 1191 East Newport Center Drive, Suite 101, Deerfield Beach, Florida 33442 on the ___19___ day of ___August_____, 2009.

_____/s/_____
Judicial Assistant