

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

CAROLYN LONERGAN,
Appellant,

CASE NO.: CVA1 08-25
Lower Case No.: 2008-CC-2655

vs.

PAULA BRANNON,
Appellee.

_____/

Appeal from the County Court,
for Orange County,
Nancy L. Clark, Judge.

Michael Resnick, Esquire,
for Appellant.

Paula Brannon, Pro Se,
for Appellee.

Before POWELL, STRICKLAND, SHEA, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant Carolyn Lonergan timely appealed from the default and default final judgment for eviction entered by the trial court on March 10, 2008, in favor of Appellee Paula Brannon. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Appellee filed a tenant eviction action against Appellant on February 12, 2008, for nonpayment of rent. Count I of the complaint stated that Appellant failed to pay rent due January 15, 2008, and was served with a three-day notice on February 5, 2008. Count II of the

complaint stated that Appellant owed \$2,550.00 in damages plus interest. Appellant was personally served with the eviction summons on February 15, 2008. On February 22, 2008, seven days after process was served, Appellant filed a thirty page document with attachments containing: an answer and affirmative defenses; a counterclaim; a motion to dismiss; a motion to determine rent to be paid into the registry of the court; a motion to declare section 83.60(2), Florida Statutes, unconstitutional; a request for jury trial; and a request for attorney's fees and costs. The trial court entered a default and default final judgment for possession on March 10, 2008, and on April 2, 2008, a writ of possession was issued. This appeal followed.

Appellant contends that the trial court erred in failing to hold a rent deposit hearing pursuant to section 83.60(2), Florida Statutes. Section 83.60(2), Florida Statutes, states in pertinent part that:

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 service of process* 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.

[emphasis added].

Appellant did not pay rent into the registry of the court; however, she timely filed a motion to determine rent on the fifth day after service of process, excluding Saturday and Sunday. Therefore, we find that the trial court erred by not complying with the statute and by entering the default and default final judgment for possession without hearing and notice to Appellant. We note that Count II remains pending.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's final judgment, dated March 10, 2008, is **REVERSED**; Appellant's motion for appellate

attorney's fees and costs 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 at Orlando, Orange County, Florida this 5 day of _____ January _____, 2010.

_____/s/_____
ROM W. POWELL
Senior Judge

_____/s/_____
STAN STRICKLAND
Circuit Judge

_____/s/_____
TIM SHEA
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 5 day of January , 2010, to the following: **Paula Brannon**, 16315 Haynie, Jupiter, Florida 33478 and **Michael Resnick, Esquire**, 100 East Robinson Street, Orlando, Florida 32801.

_____/s/_____
Judicial Assistant