27 Fla. L. Weekly Supp. 346b

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Landlord-tenant -- Public housing -- Eviction -- Appeals -- Stay -- Motion to lift stay of lower court's eviction order is denied -- Tenant whose pleadings were stricken with no lawful basis and had a default entered against her is virtually guaranteed to prevail on appeal and will suffer irreparable harm of eviction from public housing if stay is not imposed -- Requests to require tenant to post bond and deposit attorney's fees with court are denied

DOROTHY JENKINS, Appellant, v. 22ND AVENUE APARTMENTS, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 2018-168-AP-01. L.T. Case No. 2018-006427-CC-23. July 6, 2018. Miguel M. De La O, Judge. Counsel: Rebecca Schram, Legal Services of Greater Miami, Inc., Miami, for Appellant. Kara Tanis, Kelly & Grant, P.A., Boca Raton, for Appellee.

ORDER DENYING MOTION TO LIFT STAY

THIS CAUSE came before the Court upon Appellee, 22nd Avenue Apartments', Motion to Lift Stay ("Motion"). The Court has reviewed the Motion, the court file on appeal and in the tribunal below, and is fully advised in the premises. Appellee raises a number of grounds for lifting the stay. None have merit.

Appellee first argues this Court should lift the stay because "the trial court has already denied" a motion to stay pending appeal. Appellee appears to miss the very point of appellate review of lower court decisions, and certainly ignores the express, plain language of Florida Rule of Appellate Procedure 9.310 -- "(f) Review. Review of orders entered by lower tribunals under this rule shall be by the court on motion." Although this Court must, and did, give deference to the trial court's ruling denying the motion to stay pending appeal, the Court concluded that the trial court abused its discretion in denying a stay.

"In order to prevail on such a motion [to stay pending appeal], a party must establish: (1) a likelihood of success on the merits, and (2) a likelihood of harm absent the entry of a stay." *Sunbeam Television Corp. v. Clear Channel Metroplex, Inc.*, 117 So. 3d 772, 772 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D2380a]. Ms. Jenkins easily satisfied both criteria.

In fact, Ms. Jenkins possesses more than a likelihood of success on the merits, she is virtually guaranteed to prevail because her right to a trial -- a jury trial no less -- and to be heard were clearly violated by the trial court at the urging of Appellee. This was fundamental error. *See Weiser v. Weiser*, 132 So. 3d 309, 311 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D155a] ("The denial of due process rights, including the opportunity to be heard, to testify, and to present evidence, is fundamental error.").

> [T]he constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard. The right to be heard at an evidentiary hearing includes more than simply being allowed to be present and to speak. Instead, the right to be heard includes the right to introduce evidence at a meaningful time and in a meaningful manner. It also includes the opportunity to cross-examine witnesses and to be heard on questions of law. The violation of a litigant's due process right to be heard requires reversal.

Vollmer v. Key Dev. Properties, Inc., 966 So. 2d 1022, 1027 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D2505a] (citations omitted).

It appears obvious from the record before this Court that Ms. Jenkins was denied her right to be heard. She filed an answer denying the allegations in the complaint, raising a number of affirmative defenses, and demanding a jury trial. Appellee nevertheless moved the trial court to strike Ms. Jenkins' answer and affirmative defenses. The only basis set forth in Appellee's motion for default judgment was a reference to Florida Statutes section 83.56, which grants a landlord a default judgment only when the tenant fails to deposit rent into the registry of

the court. Yet, there is no dispute that Ms. Jenkins deposited her portion of the rent into the registry of the court as reflected in the docket.

In short, there was simply no lawful basis for the trial court's order striking Ms. Jenkins' pleadings; indeed, the trial court's order does not even attempt to set one forth. The failure of the Appellee's motion and the trial court's order to provide a lawful basis for striking Ms. Jenkin's answer and entering a default judgment, leaves the trial court's order without even a patina of legitimacy.

Besides violating her right to be heard, the trial court erred in not considering the *Kozel*[1] factors before striking Ms. Jenkins' answer and entering a default.

> The striking of pleadings and the entry of a default judgment is perhaps the severest sanction which can be imposed upon a defendant. It prohibits the defendant from defending the merits of the claim, leaving only the determination of damages. We previously have held that *Kozel* applies under these circumstances. We repeatedly have reversed final default judgments and orders striking pleadings in similar situations where the trial court failed to make findings of fact in its order as set forth in *Kozel.*

Motors, Pumps & Accessories, Inc. v. Miami Medley Bus. & Indus., LLC, 116 So. 3d 503, 506 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D1170b] (citation omitted). Just yesterday the Third DCA held that even where an answer is "at best [ ] inaccurate and, at worst . . . deceptive, . . . [a] trial court's order striking [ ] pleadings, leading to entry of a final judgment" is the "severest of sanctions -- foreclosing any further defense of the action and the resulting entry of final judgment -- was simply too severe under the circumstances presented and was not commensurate with the conduct and actions at bar." *Atkin v. Kane*, 2018 WL 3289357, at *1 (Fla. 3d DCA, July 5, 2018) [43 Fla. L. Weekly D1534a].

Having led the trial court to evident error, Appellee -- rather than confessing error -- doubles down on its novel interpretation of Florida's summary procedure statute. Appellee's Motion posits the remarkable argument that Florida's residential eviction statute "does not require trials if the lower court does not deem it necessary or appropriate." For support, Appellee points this Court to *Grant v. GHG014, LLC*, 65 So. 3d 1066 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2308a]. Predictably, *Grant* does not so hold. *Grant* was an appeal of a trial court's denial of a temporary injunction, and the appellate court upheld the trial court's discretion in denying the injunction. It has no relevance of any kind to the instant cause. Ms. Jenkins did not ask the trial court for an injunction, which our course is not available to a litigant as a matter of right; rather, she asked for a trial to which she was constitutional entitled.

Having led the trial court to error, having doubled down by invoking the heretofore unknown power of a trial court to arbitrarily deny trials, Appellee turns to bemoaning the inconvenience of due process by posing the apparently rhetorical question: "Considering residential evictions for possession are entitled to summary procedure under [Florida Statutes section] 51.011, what logical basis would there be to require belabored trials, draining judicial resources, in every single eviction case for possession?" Motion at 2 n. 1. One hardly knows where to begin.

First, a constitutional right is a constitutional right, regardless of the "logic" an interested party (who seeks to deny that right) may or may not see in it. Second, no one has advocated that trials are required in every eviction case. They are, however, required when a tenant files an answer denying the allegations in the complaint and the landlord does not successfully move for summary judgment. Third, it is not a drain on judicial resources[2] to provide constitutionally mandated trials. That is the point of marshaling judicial resources. Due process may not always be convenient, but it is a small price to pay for living in a constitutionally regulated democracy. Fourth, binding precedent contradicts Appellee's position. *See Baldwin Sod Farms, Inc. v. Corrigan*, 746 So. 2d 1198, 1205 (Fla. 4th DCA 1999) [24 Fla. L. Weekly D2771a] (parties are "entitled to a jury trial in an eviction proceeding").

Appellee next argues that Ms. Jenkins did not demonstrate irreparable harm because she can simply transfer her section 8 housing voucher to another residence. Setting aside the fact Appellee woefully underestimates the hurdles facing section 8 housing voucher recipients *(see* "Just 3 Percent of Miami Two-Bedroom Apartments Are Cheap Enough to Qualify for Rental Assistance," Miami New Times, Oct. 16, 2017 (http://www.miaminewtimes.com/news/miamitoo-expensive-for-hud-section-8-housing-voucher-assistance-9745779)), the argument misses the point entirely. When Ms. Jenkins and her three children prevail on appeal, they will have no remedy if they have already been forcibly removed from their apartment. That is the very definition of irreparable harm.

Appellee's last argument is that this Court should require that Ms. Jenkins post a bond pending appeal. The Court has already ordered Ms. Jenkins to deposit her portion of the rent into the registry of the court. Appellee wants more, however. It also asks for Ms. Jenkins to deposit "attorneys' fees as deemed appropriate to respond to the appeal." This Court is to left guess as to a contractual or statutory basis for Appellee to seek attorney's fees from Ms. Jenkins because the motion refers to none. Therefore, that request is denied.

It is, therefore:

ORDERED AND ADJUDGED as follows:

1. The Motion is **DENIED** in all respects.

2. Until further Order of this Court, the Clerk of Court shall continue to accept monthly rent payments from Ms. Jenkins into the registry of the court.

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[1]*Kozel v. Ostendoil,* 629 So. 2d 817 (Fla. 1993).

[2]The irony of this argument appears lost on Appellee. By attempting to preserve the trial court's judicial resources with a frivolous motion to strike, Appellee will now tax this appellate court's (including a panel of three Circuit judges) resources -- a process which is sure to be far more "belabored" than the trial of the eviction action would have been.

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