

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ANTHONY J. CIOTTI, AS
EXECUTOR OF THE
ESTATE OF ANTHONY G. CIOTTI,

Appellant,

v.

Case No. 5D18-2884

NANCI HUBSCH,

Appellee.

_____ /

Opinion filed September 4, 2020

Appeal from the Circuit Court
for Orange County,
Keith A. Carsten, Judge.

Moses Robert DeWitt, of DeWitt Law
Firm, P.A., Orlando, for Appellant.

Preston H. Oughton, of The Law Office
of Preston H. Oughton, Jacksonville, for
Appellee.

PER CURIAM.

ON MOTION FOR REHEARING EN BANC

Appellee has moved for rehearing en banc, arguing that the original opinion in this case,¹ reversing the final judgment for damages that was entered in her favor without a

¹ Ciotti v. Hubsch, 45 Fla. L. Weekly D741 (Fla. 5th DCA Mar. 27, 2020).

hearing after the defendant had been defaulted, conflicts with this court's precedent in Dunkley Stucco, Inc. v. Progressive American Ins. Co., 751 So. 2d 723 (Fla. 5th DCA 2000). Although our ruling in this case remains the same, we withdraw our prior opinion and replace it with the present opinion. We grant rehearing en banc to specifically recede from Dunkley Stucco.

Appellant, as Executor of the Estate of Anthony G. Ciotti, appeals the trial court's order denying Ciotti's² motion to vacate the final judgment in favor of Appellee. Appellant argues that the trial court violated Ciotti's due process rights when it entered the final judgment awarding Appellee unliquidated damages without notice and an opportunity to be heard. For the following reasons, we agree and therefore reverse the final judgment.³

On May 2, 2016, Appellee filed a pro se complaint for civil theft against Ciotti alleging that he agreed to remove all of Appellee's personal property from her home in foreclosure, sell the items at market value, and surrender all proceeds to her. The complaint further alleged that Appellee repeatedly wrote to Ciotti and requested a list of the items sold and the amount of money paid for those items, but that he ignored all requests and ceased all communication.

Appellee attached to her complaint a list of items that Ciotti allegedly sold, gave to his family members, or kept for himself, without any compensation to her. The itemized list grouped items together and provided a total value of the damages incurred by Appellee for each group. The total for all items came to \$42,200. Appellee sought a

² Ciotti filed the motion but passed away before the order on appeal was entered. The executor of his estate was substituted as the proper party.

³ We affirm without further discussion the trial court's denial of Appellant's motion to vacate the default entered below.

judgment against Ciotti for this amount, plus treble damages under section 772.11, Florida Statutes (2016).

After Ciotti failed to respond within twenty days of service of the summons, the trial court entered an order of default. Appellee then filed an unsworn motion for final summary judgment for damages, attaching to her motion the same list of items that had been attached to her complaint. Appellee did not notice her motion for hearing. However, on December 12, 2016, without a hearing, the trial court entered an unelaborated final judgment awarding Appellee \$126,000 in damages.⁴

Eleven months after the trial court entered final judgment and over one year after the default was entered, Ciotti filed a motion to vacate the final judgment and default pursuant to Florida Rule of Civil Procedure 1.540. In his motion, Ciotti alleged that Appellee had sought unliquidated damages in her summary judgment motion using the same unverified, itemized list of personal property that was attached to her complaint and thus, despite having been defaulted, he was entitled to notice and an opportunity to be heard prior to the entry of a final judgment. Ciotti further argued that because the record clearly showed that he was not given notice and an opportunity to be heard, the final judgment was void. See Richard v. Bank of Am., N.A., 258 So. 3d 485, 488 (Fla. 4th DCA 2018) (recognizing that a judgment is void where it is entered in violation of a party's due process guarantees of notice and an opportunity to be heard). As previously indicated, the trial court denied Ciotti's motion, and he has now appealed. The dispositive issue before us is whether, under the facts of this case, Ciotti, as a defaulted defendant, should

⁴ The final judgment simply provided that “[Appellee] recover from Anthony G. Ciotti, the sum of \$126,000 that shall bear interest at the prevailing rate of 4.9% per year for which let execution issue.”

have been provided with notice and an opportunity to be heard prior to the entry of the final judgment.

The effect of a default, such as the one entered against Ciotti in this case, is that a defendant admits to all well-pleaded allegations of a complaint, including a plaintiff's entitlement to liquidated damages. Bowman v. Kingsland Dev., Inc., 432 So. 2d 660, 662 (Fla. 5th DCA 1983). Damages are considered to be liquidated "when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." Id. In cases where the damages are liquidated, a defaulted defendant is not entitled to further notice or a hearing prior to entry of a final judgment for such damages. See Dunkley Stucco, 751 So. 2d at 724. A default, however, does not admit a plaintiff's entitlement to unliquidated damages; and a defaulted defendant is entitled to notice and an opportunity to be heard on the plaintiff's claim for unliquidated damages. Bowman, 432 So. 2d at 663. Whether a claim for damages is liquidated or unliquidated is reviewed de novo. See Kotlyar v. Metro. Cas. Ins. Co., 192 So. 3d 562, 564 (Fla. 4th DCA 2016).

In addressing whether Appellee's claim for damages here was liquidated or unliquidated, we find the First District Court of Appeal's opinion in Rich v. Spivey, 922 So. 2d 326, 327 (Fla. 1st DCA 2006), to be instructive. Rich was also a civil theft case. Id. There, the plaintiff's complaint pled specific monetary damages for personal property and household items that he alleged had been stolen by the defendants. Id. The defendants failed to answer, and a default final judgment was entered against them by the trial court, but only for nominal damages. Id.

On appeal, the plaintiff argued that his damages claim became liquidated by virtue of the defendants' default and that the trial court therefore erred in not awarding him the full and specific amount of the damages pled. Id. The First District Court disagreed and affirmed, concluding that the plaintiff's claim for the sum certain alleged in a complaint did not render the damages liquidated. Id. The court found no error in the trial court requiring a hearing to determine the plaintiff's claim for damages. Id. at 328; see also Paramo v. Floyd, 154 So. 3d 477, 478 (Fla. 2d DCA 2015) (holding that a \$34,000 item for missing building materials appeared to be based only on the plaintiffs' estimation and thus was not an exact calculation as required for liquidated damages); U.S. Fire Ins. Co. v. C & C Beauty Sales, Inc., 674 So. 2d 169, 172 (Fla. 3d DCA 1996) ("The fact that [the plaintiff] alleged in its complaint that the value of the stolen inventory was a certain amount does not make the claim liquidated.").

We agree with the analysis and result in Rich. We therefore hold that Appellee's complaint in the instant case seeking \$42,200 in damages, which was based upon her attached list of values that she placed on the respective items of personal property stolen, was a claim for unliquidated damages that did not convert to or become a liquidated damages claim by virtue of the later default entered against Ciotti. In doing so, we acknowledge that in Dunkley Stucco, our court had concluded that when a plaintiff alleges in its complaint that it was damaged in a sum certain and the defendant is later defaulted for failing to answer the complaint, "[t]his admission converts what would have been an unliquidated amount into a liquidated one." 751 So. 2d at 724. Based upon our decision today, we recede from this aspect of our decision in Dunkley Stucco.

In summary, Appellee's claim here was for unliquidated damages. Ciotti, despite having been defaulted, was thus entitled to receive notice and an opportunity to be heard and defend against Appellee's unliquidated damages claim. Bowman, 432 So. 2d at 663. As it is clear that such notice and the opportunity to be heard was not provided, the final judgment entered against Ciotti and in favor of Appellee is void and is therefore reversed.

REVERSED and REMANDED for further proceedings.

EVANDER, C.J., and ORFINGER, COHEN, WALLIS, LAMBERT, EDWARDS, EISNAUGLE, HARRIS, GROSSHANS, SASSO, and TRAVER, JJ., concur.