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

L.W.T., INC.,

Appellant,

v. Case No. 5D21-114

CHRISTINE M. SCHMIDT AND FIRST SELECT CORPORATION,

Appellees.
_____/

Opinion filed June 25, 2021

Nonfinal Appeal from the County Court for St. Johns County,
Charles J. Tinlin, Judge.

Hugh B. Shafritz and Aaron Miller, of Shafritz and Associates, P.A., Delray Beach, for Appellant.

Nicolas B. Harvey, of Withers Harvey, P.A., Gainesville, for Appellee, Christine M. Schmidt.

No Appearance for Other Appellee.

PER CURIAM.

L.W.T., Inc., timely appeals the order of the trial court that granted, in part, Christine Schmidt's second motion to vacate as void a default final judgment for damages that was entered against her in the small claims division of the county court after Schmidt was defaulted for failing to attend a scheduled pretrial conference in the case that was held in March 2000. The trial court ruled that Schmidt was entitled to relief from the judgment because "[t]here is nothing in the court file or docket that shows that the plaintiff[1] submitted any affidavit of proof as to the damages alleged in the complaint, nor was testimony taken by the court [in 2000] as to the proof of damages."

Florida Small Claims Rule 7.170(b) addressed the entry of a final judgment for damages after a defendant is defaulted. In pertinent part, the rule reads that "[a]fter default is entered, the judge shall receive evidence establishing the damages and enter judgment in accordance with the evidence and the law." *Id.* Notably, the court commentary to this rule indicated that the evidence for establishing these damages "may be by testimony, affidavit, or other competent means." Fla. Sm. Cl. R. 7.170(b) court commentary on 1972 amendment.

[1] Appellant, L.W.T., did not file the complaint. It is the assignee of the default final judgment that was entered in favor of the original plaintiff.

Contrary to the trial court's findings, the court docket from 2000, which is part of the instant record, shows that an Affidavit in Support of Claim was, in fact, filed by the original plaintiff and docketed prior to the rendition of the default final judgment. The record therefore does not conclusively demonstrate that the plaintiff failed to submit evidence of its damages back in 2000, nor did Schmidt present evidence at the hearing held on her motion to vacate the default judgment to show that such proof of damages was not submitted. Simply put, Schmidt did not meet her burden of demonstrating error when the judgment was first entered, let alone establishing that the judgment was void.

Accordingly, except as to that part of the default judgment that awarded the plaintiff $500 in attorney's fees, which L.W.T. has not challenged on appeal,[2] we reverse the appealed order and remand with directions to the trial court to enter a nunc pro tunc amended default final judgment for the amount previously awarded, less the $500 in attorney's fees.

AFFIRMED, in part, REVERSED, in part, and REMANDED with directions.

COHEN and EISNAUGLE, JJ., concur.
LAMBERT, J., concurs and concurs specially, with opinion.

[2] In its reply brief, L.W.T. acknowledges or recognizes that this limited aspect of the default final judgment may be vacated as void.

I concur with the majority opinion that, with the exception of the $500 award of attorney's fees in the judgment, which L.W.T. has not challenged and therefore I will not discuss further, the order under review must be reversed and an amended default final judgment entered.

Schmidt's primary argument raised below was that this decades-old default final judgment was void because it assessed unliquidated damages against her without proper notice and an evidentiary hearing. She contended that Florida Small Claims Rule 7.170 cannot be read to otherwise abrogate a defendant's due process right to notice and an opportunity to be heard on any portion of a claim for damages that is unliquidated. I write separately to explain why, at the time the default final judgment was entered, the damages were liquidated and, thus, regardless of how rule 7.170 should be interpreted, no further notice was required to be given to Schmidt prior to the entry of the judgment.

On March 6, 2000, a company by the name of First Select Corporation ("First Select") filed a complaint seeking damages against Schmidt in the amount of $4,786.49, plus interest, court costs, and an unspecified award of attorney's fees. First Select alleged that Schmidt owed this specific sum of

money because she had breached a credit card agreement by nonpayment. A copy of the account agreement was attached to the complaint.

The following day, a summons was issued directing Schmidt to appear at a pretrial conference in the case set for March 21, 2000. The summons warned Schmidt that she "must appear in court on the date specified in order to avoid a default judgment."

Service of process was promptly effectuated on Schmidt, but she did not attend the pretrial conference.[3] Subsequently to the pretrial conference, First Select filed separate affidavits in support of the claim, for interest and costs, and for attorney's fees. Shortly thereafter, the trial court, without further hearing, entered a default final judgment against Schmidt for the exact amount of $4,786.49 as pled in the complaint, plus interest, court costs, and attorney's fees in the amounts set forth in the respective affidavits.

In 2019, L.W.T., as assignee of the judgment, took steps to collect or execute on the judgment. Sometime thereafter, Schmidt filed the instant motion to set aside the default final judgment as void. Pertinent here,

[3] Schmidt also argued in her motion to vacate that the judgment was void because service of process was not perfected against her. The trial court rejected this argument, stating in the appealed order that the default entered against Schmidt at the pretrial conference "shall stand as entered." Schmidt did not cross-appeal this ruling.

Schmidt asserted in her motion that because the damages sought against her in the complaint were unliquidated, the default final judgment that was rendered following the pretrial conference was void because it was entered without additional notice to her and an opportunity to be heard. *See Cellular Warehouse, Inc. v. GH Cellular, LLC*, 957 So. 2d 662, 666 (Fla. 3d DCA 2007) ("A violation of the due process guarantee of notice and an opportunity to be heard renders a judgment void, and [Florida Rule of Civil Procedure] 1.540(b)(4) provides relief from void judgments at any time.").[4]

Schmidt's argument below was necessarily based on the premise that the damages sought against her were unliquidated, as opposed to liquidated. As such, Schmidt arguably recognized that if the damages were, in fact, liquidated then, as defaulted defendant, she was not entitled to further notice or an opportunity to be heard prior to the entry of the default final judgment. *See BOYI , LLC v. Premiere Am. Bank, N.A.*, 127 So. 3d 850, 851 (Fla. 4th DCA 2013) (recognizing that a default final judgment awarding both

[4] Although Florida Rule of Civil Procedure 1.540(b) is not directly applicable to small claims cases, *see* Fla. Sm. Cl. R. 7.020(a), the text of rule 1.540(b) reads identically to that of Florida Small Claims Rule 7.190(b), which provides the circumstances under which a party may seek relief from judgments or orders entered in small claims proceedings. Schmidt's motion referenced both rules.

liquidated and unliquidated damages without notice is not void as to the liquidated damages).

Under binding precedent from this court at the time, and contrary to Schmidt's present argument, the default final judgment that was entered against her in April 2000 for the specific sum pled as owed on her credit card debt did, in fact, award liquidated damages; thus, no further notice to her was necessary prior to its entry. In *Dunkley Stucco, Inc. v. Progressive American Insurance*, 751 So. 2d 723, 724 (Fla. 5th DCA 2000), which was released by this court a little over two months before the instant default final judgment, we explained that when a plaintiff had alleged in its complaint that it was damaged in a specific amount, a defaulting defendant is deemed to have admitted this allegation, thus "convert[ing] what would have been an unliquidated amount into a liquidated one." Accordingly, we concluded that due process principles did not require or entitle a defendant to a separate noticed hearing for the plaintiff to again establish that amount of damages to which the defendant has already admitted liability. *Id.*

In the present case, even if one accepts Schmidt's assertion that the $4,786 in damages specifically pled in the complaint were unliquidated, under *Dunkley Stucco*, her default at the pretrial conference converted these damages to liquidated damages. As such, the trial court properly entered

the later default judgment against her for this specific amount pled, plus the mathematically-calculable interest on these damages, from the affidavits and without a further noticed hearing. And although this court has recently receded from that portion of our decision in *Dunkley Stucco* that held that a specifically-pled amount of unliquidated damages is "converted" to liquidated damages upon default, *see Ciotti v. Hubsch*, 302 So. 3d 497, 500 (Fla. 5th DCA 2020), this change in the law is not a valid basis to vacate the judgment against Schmidt that became final back in 2000. *See Theisen v. Old Republic Ins.*, 468 So. 2d 434, 435 (Fla. 5th DCA 1985) ("After a judgment has become truly final, a change in the applicable rule of law resulting from a later appellate decision in an unrelated case is not a ground for relief from the prior final judgment under Florida Rule of Civil Procedure 1.540(b).").