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

ROBERT J. SANCHEZ AND
CARRIE SANCHEZ,

Appellants,

v.

Case No. 5D21-209
LT Case No. 2019-10302-CIDL

COUNTY OF VOLUSIA,

Appellee.

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Opinion filed December 10, 2021

Appeal from the Circuit Court
for Volusia County,
Randell H. Rowe, III, Judge.

Ronald A. Hertel, of Hertel Legal PLLC, Ormond Beach, for Appellants.

Thomas R. Brown, III, Senior Assistant County Attorney, Deland, for Appellee.

PER CURIAM.

Appellants, Robert J. Sanchez and Carrie Sanchez, appeal the final summary judgment entered in favor of Appellee, the County of Volusia, that foreclosed code enforcement liens that Appellee had assessed against Appellants' real property.[1] Appellants raise two grounds here for reversal. First, they argue that the trial court erred in striking their first affirmative defense with prejudice. Second, Appellants assert that the court should not have dismissed their amended counterclaim with prejudice. We affirm the order striking the affirmative defense without further discussion. However, and for the following reasons, we reverse the order dismissing the amended counterclaim.

Appellants' amended counterclaim alleged six causes of action. The first five counts were separate causes of action brought under 42 U.S.C. § 1983[2] for alleged constitutional rights violations. Appellants asserted that,

[1] The amount of the final judgment was slightly over $1.6 million.

[2] 42 U.S.C. § 1983 provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

among other things, their rights were violated by Appellee's agents coming onto and searching their premises without Appellants' consent or a search warrant and thereafter seizing evidence that Appellee later used to help establish the code enforcement violations that led to the imposition of the liens that were foreclosed. Appellants' sixth cause of action asserted a claim for trespass.

In dismissing the amended counterclaim with prejudice, the trial court found that several of Appellants' causes of action were either "essentially the same" or "virtually identical" to those alleged in Appellants' initial counterclaim that the court had previously dismissed. It further found that, as to all of the claims raised, Appellants "still have not stated, and cannot state a cause of action under these counts as pled."

We first address the dismissal of the trespass claim. Our standard of review of an order dismissing a complaint with prejudice is de novo. *See Palumbo v. Moore*, 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001) (citing *Abruzzo v. Haller*, 603 So. 2d 1338, 1339 (Fla. 1st DCA 1992)). Addressing the primary argument that Appellee raised below, we conclude, without detailed elaboration, that Appellants sufficiently pleaded a cause of action

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> suit in equity, or other proper proceeding for redress . . . .

for trespass. *See generally Daniel v. Morris*, 181 So. 3d 1195, 1199 (Fla. 5th DCA 2015) ("Even if no actual damages are proven [for trespass to real property], the plaintiff is still entitled to nominal damages and costs." (citation omitted)).

As to the four causes of action contained in counts one, two, four, and five of the amended counterclaim alleging violations of 42 U.S.C. § 1983,[3] we find that the trial court abused its discretion in dismissing these claims with prejudice without providing Appellants with at least one more opportunity to amend. *See Cent. Fla. Invs., Inc. v. Levin*, 659 So. 2d 492, 493 (Fla. 5th DCA 1995) ("A dismissal with prejudice should not be ordered without giving the party offering the defective pleading an opportunity to amend unless it is clear that the pleading cannot be amended so as to state a cause of action." (citing *Delia & Wilson, Inc. v. Wilson*, 448 So. 2d 621, 622 (Fla. 4th DCA 1984))).

While we acknowledge that the trial court appropriately dismissed these four causes of action as pleaded, it is not presently clear to us that Appellants' causes of action under 42 U.S.C. § 1983 can never be sufficiently alleged against Appellee. Admittedly, as an action progresses, the privilege

[3] Although Appellants asserted five separate causes of action under 42 U.S.C. § 1983, they have not challenged the trial court's dismissal of count three of their amended counterclaim.

in amending a pleading decreases to the point that a trial court does not abuse its discretion in dismissing the action with prejudice. *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992) (citing *Alvarez v. DeAguirre*, 395 So. 2d 213, 216 (Fla. 3d DCA 1981)). Nevertheless, and in light of what Appellants claim to have been a significant deprivation of their constitutional rights, we conclude that point has not been reached. Appellants have not abused the privilege to amend their counterclaim, and we conclude that they should be given at least one more opportunity to amend. *See Fla. Nat'l Org. for Women, Inc. v. State*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002) (recognizing that a factor for the trial court to consider in granting leave to amend a complaint, rather than dismissing the complaint with prejudice, is whether a party has abused the privilege to amend).

In sum, we reverse the dismissal with prejudice of counts one, two, four, and five of Appellants' amended counterclaim and remand with directions to the trial court to provide Appellants leave to file a second amended counterclaim. As previously indicated, we also reverse the dismissal of count six of the amended counterclaim as this count has been sufficiently pleaded.

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

LAMBERT, C.J., and HARRIS, J., concur.
SASSO, J., concurs in part and dissents in part, with opinion.

SASSO, J., concurring in part and dissenting in part.

I concur in the disposition of this appeal in all respects except for the decision to reverse the trial court's order dismissing counts one, two, four, and five of the amended counterclaim with prejudice. In my view, the trial court did not abuse its discretion in dismissing these counts with prejudice given the trial court's finding that the amended counterclaim presented "no new facts or legal bases which were not previously pled in the original dismissed Counterclaim." *See Citizens Prop. Ins. Corp. v. Ifergane*, 114 So. 3d 190, 194 (Fla. 3d DCA 2012) (holding trial court did not abuse its discretion in dismissing with prejudice amended complaint that "alleged no new facts and sought no new relief"); *see also Clark v. State*, 95 So. 3d 986, 987 (Fla. 2d DCA 2012) (noting abuse of discretion standard of review requires affirmance of the trial court order unless no reasonable judge could have reached the decision challenged on appeal). As a result, I dissent from that portion of this Court's opinion.