FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3084

UTAH POWER SYSTEMS, LLC,

Appellant,

v.

BIG DOG II, LLC,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
Michael A. Flowers, Judge.

December 2, 2022

TANENBAUM, J.

This appeal stems from a suit filed by Utah Power Systems, LLC ("UPS") against Big Dog II, LLC ("Big Dog") over some large generators that UPS purchased for the purpose of refurbishment and resale. UPS contracted with a third party to take possession of the generators and conduct the refurbishment, and the third party leased space from Big Dog for storing those generators. The third party defaulted on its lease with Big Dog, but the generators and some related equipment remained on Big Dog's premises. Prior to being sued by UPS, Big Dog secured a judgment against the third party for unpaid rent. Once Big Dog determined that UPS owned the generators and equipment, it allegedly demanded that UPS pay the outstanding judgment amount to obtain its personal property, which was left behind by the third-party tenant.

Following some failed negotiations between UPS and Big Dog, and service by Big Dog of a notice of intent to sell (presumably pursuant to section 715.106, Florida Statutes[1]), UPS took possession of its property and removed it from Big Dog's premises. Roughly five months transpired from the time of UPS's first contact with Big Dog to when UPS retook its property.

The primary legal theories for recovery behind UPS's suit were conversion and civil theft.[2] UPS made several attempts at pleading its case. At the close of a hearing on Big Dog's motion to dismiss directed at UPS's *third* amended complaint, the trial court explained that, based on all the allegations taken together, the pleading failed to make out the causes of action UPS was asserting. The court noted the allegations indicating that Big Dog came into possession of the property because its former tenant had left it behind on Big Dog's premises, and that UPS was able to recover its property within months—not years—of Big Dog's finding out the true owner of the property. The trial court basically was saying that both the Act and UPS's recovery of its property fatally undermined UPS's legal theories as pleaded. The trial court told UPS's counsel he could file another amended complaint that better pleaded conversion and civil theft. UPS's counsel responded that he was uncertain whether UPS could plead additional facts to support the causes of action.

In its written order, the trial court dismissed the third amended complaint and gave UPS forty-five days to file a fourth amended complaint. On the forty-fifth day, rather than file another amended pleading, UPS filed a motion for reconsideration, making the same arguments it had made in prior court filings and in opposition to the last motion to dismiss. UPS also requested an extension of time to file the fourth amended complaint, noting that if the motion to reconsider was granted, its need to file another amended pleading would be moot. The trial court denied both requests.

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[1] This provision is part of the Disposition of Personal Property Landlord and Tenant Act (the "Act"). *See* § 715.10, Fla. Stat.

[2] UPS early on dropped a cause of action for replevin.

In the meantime, Big Dog moved for a "judicial default" pursuant to rule 1.500(b) because UPS failed to timely file a new complaint. Without a hearing, the trial court granted Big Dog's motion and entered a "judicial default" against UPS.[3] Almost one year later, UPS moved to vacate the default as void, arguing that only a party seeking affirmative relief could obtain a default under rule 1.500. UPS further moved for leave to file its fourth amended complaint, in accordance with the court's prior order of dismissal. The proposed pleading, however, did not differ in any substantial way from UPS's prior pleadings, and it did not appear to address the pleading concerns raised by the trial court.

At a hearing on UPS's motions, Big Dog did not appear, and the trial court orally granted both of UPS's requests. Before a written order was rendered, however, Big Dog moved for reconsideration and explained that there was some technical problem with logging into the Zoom hearing the trial court had set, one that the judicial assistant could not resolve because she was working from home. Without any additional notice and without the benefit of a new hearing, the trial court simply rendered an order granting Big Dog's motion for rehearing, denying UPS's motion to vacate the judicial default, denying UPS's motion for leave to file a fourth amended complaint, and entering a "Default Judgment in favor of [Big Dog] and against [UPS]." UPS then appealed.

Let us first state that we empathize with the frustration surely experienced by the trial court and Big Dog. We agree with the trial court that, despite being given several opportunities over the years to sufficiently plead conversion and civil theft against Big Dog, UPS showed itself either unable or unwilling to do so.

As to the attempted claim for conversion, a plaintiff must show that "there is a taking of chattels with intent to exercise over them an ownership inconsistent with the real owner's right of possession." *W. Yellow Pine Co. v. Stephens*, 86 So. 241, 243 (Fla. 1920) (internal quotation and citation omitted). "The gist of a conversion has been declared to be not the acquisition of the

[3] Immediately after entry of the default, the matter was stayed for eleven months due to Big Dog's bankruptcy case. *See In re: Big Dog II, LLC*, 19-30284-JCO (Bankr. N.D. Fla.).

property of the wrongdoer, but the *wrongful* deprivation of a person of property to the possession of which he is entitled." *Star Fruit Co. v. Eagle Lake Growers*, 33 So. 2d 858, 860 (Fla. 1948) (emphasis supplied). For there to be a wrongful deprivation, there must be a "wrongful exercise or assumption of authority over another's goods, depriving him of the possession, *permanently or for an indefinite time*." *Id.* (emphasis supplied). UPS averred facts that directly undermined at least one element of conversion. *Cf. Robinson v. Hartridge*, 13 Fla. 501, 515 (1869) ("So if a man finds property, he may lawfully take it *and take care of it,* but if he afterwards sells it without authority, that *ipso facto* will be a conversion." (internal quotation and citation omitted)). The trial court made this clear to counsel for UPS, but UPS took no steps to address the deficiency.

A similar deficiency existed regarding UPS's attempt at a civil theft claim under section 772.11, Florida Statutes. That provision is part of the Civil Remedies for Criminal Practices Act. Under it, "[a]ny person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation" of the Florida Anti-Fencing Act[4] has "a cause of action for threefold the actual damages sustained." § 772.11(1), Fla. Stat. To prove theft under the Anti-Fencing Act, there must be an "intent to steal." *Daniels v. State*, 587 So. 2d 460, 462 (Fla. 1991); *State v. Dunmann*, 427 So. 2d 166, 167 (Fla. 1983). In other words, compared to conversion, even more must be shown to prove civil theft. *See Lewis v. Heartsong, Inc.*, 559 So. 2d 453, 454 (Fla. 1st DCA 1990) (holding that "a felonious intent to steal is a necessary element of proof in an action for damages based on a violation of section 812.014(1)"). Of course, because UPS's allegations affirmatively obviated a claim for conversion, they necessarily also obviated a claim for civil theft.

All of this is to say that, on this record and the alleged facts (at least so far), the time clearly had come for the trial court justifiably to bring UPS's effort to sue Big Dog to a close. By UPS's

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[4] *See* § 812.005, Fla. Stat. (identifying sections 812.012 through 812.037—the provisions specified in the civil theft statute—as the provisions making up the act).

own allegations, Big Dog lawfully came into possession of UPS's property by virtue of the third party's lease default and that party's subsequent quitting of the premises. There was no allegation that Big Dog failed to take care of the property or that Big Dog sold the property. Instead, each of four operative pleadings asserted that in under half a year from when UPS apparently demanded return of the property, Big Dog complied by allowing UPS to enter its premises and reclaim it. Neither a conversion nor a civil theft claim could rest on these facts alone. UPS had ample opportunities to fix this by alleging additional facts that might support those claims or perhaps an alternate legal theory, but it did not—not even in its fifth attempt (that is, its proposed *fourth* amended complaint). Instead, UPS chose to engage in efforts at further delay.

Our only quibble here is with the trial court's mode of disposition, which started with Big Dog's improper motion for default under rule 1.500. Rule 1.500(b) governs judicial defaults and provides as follows: "When a party *against whom affirmative relief is sought* has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party." Fla. R. Civ. P. 1.500(b) (emphasis supplied). The rule limits defaults to parties who seek affirmative relief, as a means of "preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim." *Coggin v. Barfield*, 8 So. 2d 9, 11 (Fla. 1942). Because Big Dog did not seek any affirmative relief, the trial court's entry of a judicial default was not procedurally correct.

That procedural hiccup led to the erroneous rendition of a default judgment against UPS. The rule allows for entry of a final judgment at any time after a default. Fla. R. Civ. P. 1.500(e). As we just noted, however, the rule anticipates a default regarding a party against whom relief has been sought—where that party refuses to plead in defense. The presumption underlying that rule is the existence of an operative pleading that *seeks* relief and a failure to respond. As of the time that the trial court rendered a "default judgment," the third amended complaint remained dismissed, and UPS had not been given leave to file a fourth amended complaint. There in turn was not even an operative affirmative pleading upon which to enter a judgment. *Cf.* Fla. R. Civ. P. 1.140(c) (allowing for judgment on the pleadings after

pleading has closed); *id.* (h)(2) (allowing for defense of failure to state a cause of action to be raised by motion for judgment on the pleadings); *but cf. Hancock v. Piper*, 186 So. 2d 489, 490 (Fla. 1966) (holding "that an order dismissing a cause but granting additional time in which to file an amended complaint is nothing more than an interlocutory order and that the court still has control of the litigation").

UPS's failure to file a newly amended pleading within the time allowed by the trial court may not, as a technical matter, have been a failure to comply with the court's order. It was, however, a continuing failure to state a cause of action in the case, which is in contravention to what the rules require. *Cf. Edward L. Nezelek, Inc. v. Sunbeam Television Corp.*, 413 So. 2d 51, 54 (Fla. 3d DCA 1982) ("Failure to amend after being given leave to amend is not disobedience of a court order, but is merely a continuing failure to state a cause of action."). The proper motion for Big Dog to have filed in this situation was a motion for involuntary dismissal. *See* Fla. R. Civ. P. 1.420(b) (allowing for involuntary dismissal, on motion, "for failure of an adverse party to comply with these rules"); *cf. Shannon Motors, Inc. v. Vans & Vehicles, Inc.*, 423 So. 2d 551, 552 (Fla. 1st DCA 1982) (discussing with approval the use of an involuntary dismissal under rule 1.420 after a party has been given leave to file an amended pleading but has failed to do so (adopting reasoning of *Sunbeam Television*)). Big Dog filed no such motion.

Contrary to what the dissent suggests, the error here is more than just the use of one word rather than another (*i.e.*, "default" versus "dismissal"). As this court previously has explained, before there can be an involuntary dismissal with prejudice under rule 1.420, one of the following two conditions must be met: either 1) there first is a properly noticed hearing on a motion pursuant to rule 1.420; or 2) a warning in the dismissal without prejudice that specifically provides that the dismissal will be with prejudice if there is not a timely amendment. *See Shannon Motors*, 423 So. 2d at 552; *see also* Fla. R. Civ. P. 1.420(b) (requiring service of a notice of hearing on a motion for involuntary dismissal with prejudice). Neither condition was met in this case. Because of the various procedural miscues, there was no hearing that preceded rendition of the so-called "judicial default" or rendition of the so-called

"default judgment." Moreover, the order dismissing the third amended complaint did not contain a warning of the consequences for failing to timely file an amended complaint.

The trial court no doubt had become exasperated with the dilatoriness of UPS. As we have said, we are dubious about the viability of UPS's conversion and civil theft claims, given the averments made so far. At the same time, the involuntary dismissal with prejudice that we are talking about here would count as an adjudication on the merits. *Cf.* Fla. R. Civ. P. 1.420(b). The trial court's abrupt dismissal with prejudice, without prior notice or warning, effectively deprived UPS of its *right* to accept a voluntary dismissal *without prejudice* under rule 1.420(a). *See Hibbard v. State Rd. Dept. of Fla.*, 225 So. 2d 901, 902 (Fla. 1969) (agreeing that a dismissal of a complaint with leave to amend does "not cut off plaintiff's [] right to file a voluntary dismissal" by notice under rule 1.420(a)). UPS is entitled to proper notice and an opportunity to be heard before any claim it might have against Big Dog on these facts is foreclosed forever. *Cf. Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 430–31 (Fla. 2013) (explaining that the constitutional guarantee of due process requires that a party be given "fair notice" and "a real opportunity to be heard" before its claim or defense is finally adjudicated).

We, then, can say easily that the trial court's erroneous entry of a judgment against UPS without prior notice was a miscarriage of justice. *See* § 59.041, Fla. Stat. For this reason alone, we reverse the judgment rendered against UPS. We also vacate the trial court's order granting Big Dog's "Motion for Judicial Default," and remand with an instruction that the trial court designate Big Dog's motion as a request for involuntary dismissal pursuant to rule 1.420(b) and hold a properly noticed hearing on that request.

REVERSED and REMANDED with INSTRUCTION.

LEWIS, J., concurs; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

Over five years ago, Utah Power Systems (UPS) attempted to state claims for relief against Big Dog II, LLC, but was unable to do so over the subsequent three years. During this time, the trial judge charitably allowed UPS *four* additional opportunities to amend its complaint, three of which resulted in dismissals of the claims asserted with leave to amend and try again. On the fourth attempt, UPS failed to even file an amended complaint, which led to the entry of a "default" against UPS for its non-compliance with the trial court's order.

UPS filed various motions seeking to vacate the "default" and to allow it, once again, to file yet another amended complaint. On this extensive and lengthy record, which conclusively shows that UPS has no actionable claims to be asserted, no prejudicial error has been shown, and affirmance is required.

The only purported "error" that exists is the order of dismissal being cast as a "default" rather than a dismissal. But everyone at the trial court level clearly understood, including UPS, that UPS's seemingly endless attempts to find a legally cognizable claim had come to an end—it had made four unsuccessful attempts and didn't bother to file a fourth amended complaint. UPS filed various motions seeking rehearing and another (fifth!) opportunity to file yet another iteration in its series of failed complaints. In its own filings, it clearly understood that the case was being dismissed, albeit labeled as a default. ("In the alternative [to a default], should this Court dismiss this case with prejudice, UPS respectfully requests that this Court provide factual findings in its order for the purpose of providing a complete record on appeal.").

Under these circumstances, UPS had more than adequate due process; indeed, it could be argued that the prior dismissals ought to have been with prejudice to bring this litigation to an end much

sooner. Absolutely no fault exists in how the two trial judges, over three years, handled this matter; they showed extraordinary leniency and patience, properly bringing this case to an end in 2020 after three years of litigation (the case has been pending in this Court for over two years despite only an initial brief having been filed). Due process was abundantly bestowed on UPS, who had many more opportunities to file amended complaints than do most litigants. Litigation is unlike fishing, where a rod can be cast endlessly in the hope that something will bite the hook.

Plus, no prejudice can be shown as to the order of "default." At most, the use of the word "default" instead of "dismissal" in the trial court's order is of a technical nature with no showing of harmful or reversible error. *See, e.g.*, *Godshall v. Hessen*, 227 So. 2d 506, 508 (Fla. 3d DCA 1969) (default was error but the record "amply support[s] the judgment entered in this cause, that action of the trial court was harmless error, and does not constitute a basis for reversal here"). UPS knew what was going on and can't now complain that the procedural formalities of a default would change the outcome.

Importantly, the legislature enacted a harmless error statute for precisely this type of case, saying:

> No judgment shall be . . . reversed . . . in any cause, civil or criminal, . . . or . . . *for error as to any matter of pleading* ***or procedure***, *unless* in the opinion of the court . . ., after an examination of the entire case it shall appear that *the error complained of has resulted in a miscarriage of justice*. This section shall be liberally construed.

§ 59.041, Fla. Stat. (2022) (emphasis added). The "error" in this case—the use of a default instead of a dismissal—is within the bullseye of this statute, which is construed to prevent the types of miscarriages of justice that occur, for example, when an utter disregard for due process occurs; this case is the antithesis of such a situation. The case was justly adjudicated and terminated; any procedural error is obviously harmless. Moreover, affirmance is proper under the tipsy coachman rule, given that the record clearly shows the ongoing futility of UPS's attempts to assert claims. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) ("[T]he 'tipsy

coachman' doctrine[ ] allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" (quoting *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999))).

Finally, a reversal in this case on hyper-technical grounds will cause trial judges to scratch their heads, scrunch their foreheads, and rightfully wonder what was so egregiously wrong that a "miscarriage of justice" was done to UPS, whose original, amended, second amended, and third amended complaints were all swings-and-a miss—and it stood idly by as the deadline for its fourth amended complaint came and went. Four whiffs and a called strike are most assuredly an out. And what is the trial judge to do next? No pending motions are to be addressed and, at best, the trial judge will trundle the lawyers back together once again (an almost six-year reunion of sorts) and thereafter enter an order of dismissal, resulting in more delay and even more wasted judicial and non-judicial resources on a case that the record conclusively shows is beyond life support.

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