NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

UNITED CAPITAL FUNDING CORP., a Florida corporation, Appellant, v. TECHNAMAX, INC., a foreign corporation, and LISA BRYAN, an individual, d/b/a TECHNAMAX, INC., Appellees.	)	Case No. 2D06-2955

Opinion filed December 22, 2006.

Appeal from the Circuit Court for Pinellas County; Frank Quesada, Judge.

Marie Tomassi and Jay M. Walker of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, PA., St. Petersburg, for Appellant.

Paul W. Hitchens and Robert W. Hitchens of Paul W. Hitchens, P.A., St. Petersburg, for Appellees.

CASANUEVA, Judge.

United Capital Funding Corp. ("United Capital") appeals the trial court's decision to vacate the default judgment entered against Lisa Bryan, d/b/a Technamax, Inc. ("Bryan"). United Capital contends that the evidence presented by Bryan was legally insufficient to sustain a finding of excusable neglect, an element that must be met in order to set aside a default judgment. After review of the record and applicable case law, we agree.

A trial court's decision to set aside a default judgment is reviewed for gross abuse of discretion. Benedict v. W.T. Hadlow Co., 42 So. 239, 241 (Fla. 1906); Geer v. Jacobsen, 880 So. 2d 717, 720 (Fla. 2d DCA 2004). In this case, the trial court determined that Bryan had shown excusable neglect and a meritorious defense, and the court vacated the default judgment. However, three elements must be proven for a default judgment to be set aside. The defaulting party must show: "(1) that its failure to file a responsive pleading was a result of excusable neglect; (2) that it had a meritorious defense; and (3) that it acted with due diligence in seeking relief from the default." Allstate Floridian Ins. Co. v. Ronco Inventions, LLC, 890 So. 2d 300, 301 (Fla. 2d DCA 2004). On appeal, both parties concede the issue of a meritorious defense, and neither party raises the issue of due diligence. Thus, the sole issue before the court is whether the trial court's determination that Bryan demonstrated excusable neglect was a gross abuse of discretion. We conclude that it was.

The element of excusable neglect must be proven by a sworn statement or affidavit. DiSarrio v. Mills, 711 So. 2d 1355, 1356 (Fla. 2d DCA 1998); Schauer v. Coleman, 639 So. 2d 637, 638-39 (Fla. 2d DCA 1994). The burden rests on the defaulting party to prove it has a legal excuse for failing to respond to the plaintiff's

complaint. See Hornblower v. Cobb, 932 So. 2d 402, 406 (Fla. 2d DCA 2006); Stone-Rich Props. v. Britt, 706 So. 2d 330, 332 (Fla. 2d DCA 1998). In the instant case, Bryan did file a sworn affidavit with the court, but in the affidavit, Bryan failed to offer any reason for her failure to respond to the plaintiff's complaint. Since the affidavit did not address the issue of why Bryan failed to file a timely response, it was insufficient, as a matter of law, to satisfy the element of excusable neglect. See Rivera v. Dep't of Revenue, 899 So. 2d 1265, 1267 (Fla. 2d DCA 2005) (noting excusable neglect cannot be established if a party offers no facts to support a finding of legal excuse for failure to comply with the rules of civil procedure). Therefore, the trial court's finding of excusable neglect was erroneous, and the decision to set aside the default judgment was a gross abuse of discretion.

Reversed and remanded for reinstatement of the default judgment.

VILLANTI, J., Concurs.
ALTENBERND, J., Concurs with opinion in which VILLANTI, J., Concurs.

ALTENBERND, Judge, Concurring.

I concur in this opinion and agree that the established standard of review for this issue is gross abuse of discretion. See, e.g., Mercury Marine Indus., Inc. v.

Dillon, 779 So. 2d 356, 357 (Fla. 2d DCA 2000); Marshall Davis, Inc. v. Incapco,Inc., 558 So. 2d 206, 207 (Fla. 2d DCA 1990). I admit that in light of the standard for abuse of discretion announced in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), I do not have any adequate description of "gross abuse of discretion" to apply as the standard of review in a case like this. See Laura Whitmore, Abuse of Discretion: Misunderstanding the Deference Accorded Trial Court Rulings, 79 Fla. Bar J. No. 6, at 83 (June 2005). I believe we should review this case as a matter of law de novo.

As our opinion explains, a defaulting party must make a tripartite showing to set aside a default. In this case, Lisa Bryan made no showing whatsoever of excusable neglect for her failure to file a responsive pleading. She appears to have confused or intermingled the first prong, excusable neglect, with the third prong, due diligence. Her entire focus was on a claim of excusable neglect for her somewhat delayed due diligence in seeking relief from the default. Without any showing that her failure to file a timely responsive pleading was excusable, I do not believe that she presented to the trial court the predicate necessary for the trial court to have the power to exercise discretion. See Townsend v. Townsend, 585 So. 2d 468, 469 (Fla. 2d DCA 1991) (reversing a modification of alimony because husband did not present proof of a substantial change, which "is a prerequisite to a trial court's authority to exercise discretion to modify permanent alimony"); Cowie v. Cowie, 564 So. 2d 533, 535 (Fla. 2d DCA 1990) (stating that until a petitioner presents evidence to surpass a minimum threshold, "the trial court does not have the authority to exercise its discretion"). Thus, while I agree with the result in this case, if I had the option I would not hold that the trial court committed a gross abuse of discretion. Instead, I would hold that it erred as a

matter of law in making a discretionary decision without a legal basis in the record to authorize the exercise of discretion.