

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 50-2017-AP-000109-CAXX-MB
L.T. NO.: 50-2015-CC-012915-XXXX-MB

SETH RUBECK AND DIALYSIS
SERVICES OF BOCA, INC.,
Appellants,

v.

ACE AMUSEMENT SERVICE, INC.,
Appellee.

Opinion filed: **JAN 14 2019**

Appeal from the Palm Beach County Court, Judge Dana Santino

For Appellant: Richard W. Glenn, Esq.
16456 115th Avenue North
Jupiter, FL 33478
rwglenn@rwglenn.com

For Appellee: Anthony J. Solomon, Esq.
1213 Omar Road
West Palm Beach, FL 33405
Tjsolomon12@gmail.com

PER CURIAM.

Appellants, Seth Ruback (“Ruback”)¹ and Dialysis Services of Boca, Inc. (“Dialysis”), appeal the trial court’s entry of default final judgment in favor of Appellee Ace Amusement Service, Inc. (“Ace Amusement”). Ace Amusement filed a civil theft action against Ruback and Dialysis, which was initially assigned a small claims case number, and which was later redesignated as a county court case. Ace Amusement thereafter filed for a clerk’s default, and the clerk entered a default against Dialysis on January 8, 2016. Ruback and Dialysis² filed a “Motion to Set Aside Clerk’s Default Granted in Derogation of the Rules,” which the trial court denied. The trial court then entered default final judgment against Ruback and Dialysis, striking Ruback and Dialysis’ answer and affirmative defenses. Ruback and Dialysis filed a Motion for Rehearing, which the trial court also subsequently denied.

On appeal, Ruback and Dialysis argue the clerk improperly entered a default because Ruback and Dialysis filed a Motion to Dismiss for Lack of Jurisdiction on November 16, 2015, prior to the clerk entering a default. Ruback and Dialysis also assert that the trial court erred by redesignating the case from small claims to county court, that a simple monetary debt cannot form a civil theft claim, and that the trial court erred by striking Ruback and Dialysis’ answer and affirmative defenses. We agree that the default final judgment must be reversed as to the first issue, and therefore decline to address the remaining issues.

“An order denying a motion to vacate a default is reviewed under an abuse of discretion standard.” *Lloyd’s Underwriter’s At Londo v. Ruby, Inc.*, 801 So. 2d 138, 139 (Fla. 4th DCA 2001) (citing *George v. Radcliffe*, 753 So. 2d 573, 575 (Fla. 4th DCA 1999)). “A trial court’s decision on a motion for rehearing is reviewed for abuse of discretion . . .” *Muth v. AIU Ins. Co.*,

¹ Appellant’s name is listed as Rubeck in the docket, but the record shows Ruback listed on Appellant’s credit card and driver’s license. (R. at 19.)

² Ruback and Dialysis filed the motion collectively, despite a default only being entered against Dialysis.

982 So. 2d 749, 752 (Fla. 4th DCA 2008). Abuse of discretion turns on the reasonableness of a trial court's actions. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

When a party fails to file or serve *any* document, “the party seeking relief may have the clerk enter a default against the party failing to serve or file such document.” Fla. R. Civ. P. 1.500(a). For purposes of Florida Rule of Civil Procedure 1.500, any document means any paper. *Stuart-Findlay v. Bank of Am., Nat. Ass’n*, 183 So. 3d 468, 470 (Fla. 4th DCA 2016). The trial court also may enter a default when a party fails to plead or defend against an action for affirmative relief. *See* Fla. R. Civ. P. 1.500(b). However, “[o]nce ‘any paper’ has been served, rule 1.500(b) requires service of a notice of application for default and requires the court, *not* the clerk, enter any default.” *Ziff v. Stuber*, 596 So. 2d 754, 755 (Fla. 4th DCA 1992). Even if a party failed to timely file a response, if the party filed any paper, the clerk may no longer enter a default. *See Stuart-Findlay*, 183 So. 3d at 471.

Having reviewed the record on appeal, we find that the record clearly shows that Ruback and Dialysis filed a “Motion to Dismiss for Lack of Jurisdiction” prior to the entry of the clerk’s default. Although Ace Amusement points out that the trial court *could* have entered a default, the trial court did not. And because the motion constituted a “document” for purposes of Florida Rule of Civil Procedure 1.500(a), subsection (b) of that Rule permitted only the trial court to enter any default. As noted in *Stuart-Findlay*, even when a party fails to adhere to a court order, if the court itself did not actually enter a default, it is reversible error. Therefore, we find that because the clerk entered a default here, the trial court abused its discretion in denying Ruback and Dialysis’ Motion to Set Aside Clerk’s Default and subsequent Motion for Rehearing. Accordingly, we **REVERSE** the default final judgment below, direct the lower court to vacate the order granting

final judgment in favor of Ace Amusement, and **REMAND** this cause to the trial court for proceedings consistent with this opinion.

We also **DENY** Ace Amusement's Motion for Appellate Attorney's Fees filed pursuant to Florida Rule of Appellate Procedure 9.400 and section 59.46, Florida Statutes, because Ace Amusement is not the prevailing party on appeal.

Finally, we write separately to address Ruback and Dialysis' failure to comply with several of this Court's Orders. On January 2, 2018, this Court entered an Order granting Ruback and Dialysis' Second Motion for Extension of Time, providing an additional ten (10) days within which to file their Initial Brief. When they failed to do so, this Court issued an Order directing Ruback and Dialysis to show cause why this appeal should not be dismissed as a result of their failure to file an Initial Brief. After Ruback and Dialysis responded to that Order, this Court gave Ruback and Dialysis an additional ten (10) days to file their Initial Brief. Ruback and Dialysis once again failed to comply with this Court's Order, filing their Initial Brief on the eleventh (11th) day. Therefore, it is hereby **ORDERED** that Ruback and Dialysis shall **SHOW CAUSE**, in writing, within ten (10) days from the date of this Opinion why they should not be sanctioned by this Court pursuant to Florida Rule of Appellate Procedure 9.410(a).

GOODMAN, ROWE, and HAFELE, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 50-2017-AP-000109-CAXX-MB
L.T. NO.: 50-2015-CC-012915-XXXX-MB

SETH RUBECK AND DIALYSIS
SERVICES OF BOCA, INC.,
Appellants,

Opinion/Decision filed: **JAN 14 2019**

v.

Appeal from Palm Beach County Court
Judge Dana M. Santino

ACE AMUSEMENT SERVICE, INC.,
Appellee.

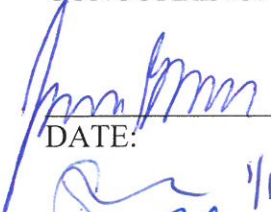

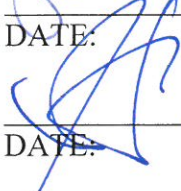
Date of Appeal: August 4, 2017

_____/_____
DATE OF PANEL: NOVEMBER 16, 2018

PANEL JUDGES: GOODMAN, ROWE, HAFELE

AFFIRMED/REVERSED/OTHER: REVERSED

PER CURIAM OPINION/DECISION BY: PER CURIAM

CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:)
	)	With/Without Opinion	)	With/Without Opinion)
)))
DATE: <u>1/14/19</u>)))
J.	)	J.	)	J.)
)))
DATE: <u>1/14/19</u>)))
J.	)	J.	)	J.)
)))
DATE: <u>1/14/19</u>)))
J.	)	J.	)	J.)