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

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 50-2019-AP-000116-CAXX-MB
L.T. NO.: 50-2018-CC-008240-XXXX-SB

FAMILY FIRST HEALTH PLANS, INC., MATTHEW O'LEARY, & PATRICK STERN,
Appellants,

v.

MROD REALTY CORP.,
Appellee
_____/

Opinion filed: September 9, 2020

Appeal from the County Court in and for Palm Beach County,
Judge Marni Bryson


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PER CURIAM.

Appellant Family First Health Plans, Inc. ("Family First")—along with two of its officers, Matthew O'Leary and Patrick Stern—appeal the county court's final judgment entered on July 3, 2019 in favor of the Appellee, MROD Realty Corp. ("MROD"). Appellants argue that the lower court denied them procedural due process at several points in the proceedings, rendering the final judgment void. We hold that the lower court denied Appellants procedural due process by failing to rule on a potentially dispositive motion to quash service of process before entering a judicial

default and subsequently awarding final judgment to MROD. Therefore, we reverse and remand for further proceedings consistent with this opinion.

## Factual and Procedural Background

MROD, the owner of commercial property in Delray Beach, FL (the "Property"), entered into a month-to-month Occupancy License Agreement (the "Agreement") with Appellant Family First. Pursuant to the Agreement, Appellants Stern and O'Leary, officers of Family First, entered into a Guaranty with MROD. While the parties disagree on the circumstances leading up to litigation, MROD ultimately provided Appellants with a three-day notice to pay past due rent on July 2, 2018. MROD filed a Complaint against Appellants in county court on July 11, 2018.

On August 14, 2018, trial counsel for Appellants, David A. Fry, Esq., filed a "Motion to Quash Invalid Service of Process." MROD opposed the motion to quash, arguing that Appellant Stern was properly served and that the remaining Appellants had no standing to bring the motion because Attorney Fry only filed a notice of appearance on behalf of Stern. Appellants later conceded that Family First and Stern were properly served, but continued to contest the validity of service of process as to O'Leary. Attorney Fry then filed an Answer and Affirmative Defenses on behalf of Appellants Family First and Stern, but not Appellant O'Leary.

On October 5, 2018, MROD filed a Motion for Court Default against Appellant O'Leary on Counts 1 and 3 of the Complaint. Following a hearing, the transcript of which is not contained in the record, the lower court issued an order entering judicial default against O'Leary. In this order, the court also ruled that since the Agreement imposed joint and several liability against the remaining Appellants, final judgment should also be entered against Appellants Family First and Stern. Thereafter, the Court entered a final default judgment in favor of MROD against O'Leary

individually and a final judgment against Family First and Stern jointly and severally in the amount of $39,289.52 for damages, attorney's fees, and costs. Appellants timely appealed.

**Analysis**

Appellants argue that the lower court deprived them of procedural due process at four separate instances. Of particular note, Appellants allege that they were deprived procedural due process when the lower court entered a judicial default against Appellant O'Leary and then entered final judgment against all Appellants without ruling on Appellant O'Leary's motion to quash service of process. Due process requires a lower court to definitively rule on a pending motion to quash service of process before it enters either a judicial default or default judgment against a party. Consequently, we reverse on this issue without addressing the remainder of Appellant's arguments.[1]

A court may properly enter a judicial default against a party if it "has failed to plead or otherwise defend" against a cause of action and the defaulting party is provided "notice of the application for default" if it has filed or served any document in the action. Fla. R. Civ. P. 1.500(b); *see also Hendrix v. Dep't Stores Nat. Bank*, 177 So. 3d 288, 290–91 (Fla. 4th DCA 2015). However, a court may not enter a default or default judgment if there are pending motions that raise certain defenses. *See* Fla. R. Civ. P. 1.140(d); *see also* § 51.011(1), Fla. Stat. (2018) (stating that, in summary proceedings, all defensive motions "including motions to quash" must be heard by the trial court prior to trial). Notably, the Fourth District Court of Appeal has held that a clerk default cannot be entered if the "defaulting" party files a motion to quash service of process.

[1] Appellee argues that Appellants did not preserve their arguments for appeal, but the denial of procedural due process constitutes fundamental error and may be raised for the first time on appeal. *Pena v. Rodriguez*, 273 So. 3d 237, 240–41 (Fla. 3d DCA 2019); *see also Farinas v. State*, 569 So. 2d 425, 429 (Fla. 1990) ("Absent fundamental error, an issue will not be considered for the first time on appeal.").

*Carson v. Rossignol*, 559 So. 2d 433, 433–34 (Fla. 4th DCA 1990); *see also Ripley v. Ripley*, 278 So. 3d 190, 192 (Fla. 5th DCA 2019) (holding the same). We see no reason why *Carson* should not apply to judicial defaults as well. *See* Fla. R. Civ. P. 1.500(a), (b). Therefore, the court should not have entered a judicial default against O'Leary while his motion to quash was pending.

Assuming, *arguendo*, that the lower court did not err in entering a judicial default against Appellant O'Leary, it was certainly improper to enter a final default judgment. A default judgment cannot be entered when there is "an undisposed motion pending that would affect the plaintiff's right to proceed to judgment." *Singh v. Kumar*, 234 So. 3d 1, 3 (Fla. 4th DCA 2017).There is no doubt that a motion to quash service of process is dispositive since a court does not acquire jurisdiction over a defendant, and therefore cannot enter a default judgment, until a summons is properly issued and served. *Seymour v. Panchita Inv., Inc.*, 28 So. 3d 194, 196 (Fla. 3d DCA 2010); *Alvarez v. State Farm Mut. Auto Ins. Co.*, 635 So. 2d 131, 132 (Fla. 3d DCA 1994).

Appellee argues that Appellant O'Leary was not denied due process since he presented no evidence that service was actually invalid. This argument is unavailing for two reasons. First, regardless of the motion's validity, the lower court was required to make a ruling on it before entering a default. *See Carson*, 559 So. 2d at 433–34. Second, the motion to quash to service of process properly alleged that the return of service was facially insufficient. Appellant O'Leary was thus entitled to an evidentiary hearing on the matter. *See Talton v. CU Members Mortg.*, 126 So. 3d 446, 447 (Fla. 4th DCA 2013); *Gonzalez v. Totalbank*, 472 So. 2d 861, 864 (Fla. 3d DCA 1985). Because Appellant O'Leary never received a hearing that he was legally entitled to, the lower court denied him procedural due process. *See Cnty. of Pasco v. Riehl*, 635 So. 2d 17, 18–19 (Fla. 1994). On remand, the lower court must hold an evidentiary hearing on Appellant O'Leary's motion to

quash service of process. We express no opinion, however, on whether O'Leary's motion ultimately has merit.

While the lower court's error directly affected the due process rights of Appellant O'Leary, the other two Appellants are also entitled to relief from the final judgment. A trial court is not required to enter a default judgment in all cases where there are also non-defaulting co-defendants; the court should instead "evaluate whether the entry of the default judgment could lead to an absurd, unjust, or logically inconsistent result." *Days Inns Acquisition Corp. v. Hutchinson*, 707 So. 2d 747, 751 (Fla. 4th DCA 1997); *see also N. Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 853 (Fla. 1962) (holding that, when possible, a case shall be resolved on the merits rather than by default judgment). By entering a final judgment against all Appellants, not just O'Leary, the lower court essentially treated the other Appellants as if they also defaulted, even though they had served an answer and were ready to proceed on the merits. This was an unjust result. *See Hutchinson*, 707 So. 2d at 751 (citing *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319, 321 (8th Cir. 1997) ("when defendants are sued as jointly liable, and less than all default, the court may not enter default judgment against the defaulted defendants until the liability of nondefaulted defendants has been decided")). On remand, the lower court must resolve Appellee's claims against Family First and Stern on the merits, irrespective of its ruling on Appellant O'Leary's motion to quash service of process.

## Conclusion

The lower court denied Appellants procedural due process when it failed to rule on Appellant O'Leary's motion to quash service of process before entering a judicial default and final judgment, which also prevented the other Appellants from arguing their case on the merits. Accordingly, we **REVERSE** the final judgment of the lower court and **REMAND** for further

proceedings consistent with this decision. We also **GRANT** the Appellee's Motion to Strike portions of Appellant's Initial Brief and **DENY** Appellee's Motion for Appellate Attorney's Fees.

HAFELE, COATES, and CHEESMAN, JJ., concur.