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

APPELLATE DIVISION (CIVIL)
Case No.: 502009AP000056XXXXMB
L.T. No.: 502008CC013934XXXXSB-RB
Division: 'AY'

ROBERT BOGDANOFF AND
LORI BOGDANOFF,

Appellants,

v.

BROKEN SOUND CLUB, INC.,

Appellee.

_____/

Opinion filed: AUG 25 2009

Appeal from the County Court, in and for Palm Beach County, Florida;
Judge James Martz.

For Appellant: Shane Farnsworth, Esq.
70 SE Fourth Ave.
Delray Beach, FL 33483

For Appellee: Chad Laing, Esq.
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Suite 330
Boca Raton, FL 33487

PER CURIAM.

AFFIRMED in part and REVERSED in part.

Robert Bogdanoff and Lori Bogdanoff seek review of the trial court's final default judgment entered in favor of Broken Sound Club, Inc. ("Broken Sound") against Robert and Lori, individually. The Bogdanoffs collectively argue that the trial court erred in entering default judgment against them because they were not provided with the requisite notice of application of

default by Broken Sound. They contend that their response to Broken Sound's complaint, vis-à-vis a Motion to Abate filed on October 15, 2008, precluded the lower court from entering a default unless proper notice of such application of default was provided to them. We find that Lori Bogdanoff was provided with proper notice, but Robert Bogdanoff was not, and therefore affirm the entry of the default final judgment against Lori Bogdanoff but reverse the entry of the default final judgment as to Robert Bogdanoff.[1]

Whenever any party "has filed or served any paper in the action, that party shall be served with notice of the application for default." Fla. R. Civ. P. 1.500(b); *see also State, Dep't. of Rev. v. Thurmond*, 721 So. 2d 827 (Fla. 3d DCA 1998) (judgment entered without notice to a party is void ab initio); *Dep't. of Transp. v. Mastrangelo,* 691 So. 2d 643 (Fla. 5th DCA 1997) (order of default improper where defendant, who had filed papers in action, had not been served with notice of default). The term "paper" is construed liberally and includes any written communication that informs the plaintiff of the defendant's intent to contest the claim. *Becker v. Re/Max Horizons Realty, Inc.,* 819 So. 2d 887 (Fla. 1st DCA 2002). Absent extraordinary circumstances, an *ore tenus* motion made in open court does not constitute prior notice of default judgment, even when the party is present. *Molina v. Watkins,* 824 So. 2d 959 (Fla. 3d DCA 2002); *see also Iteka International v. Hinson,* 671 So. 2d 204 (Fla. 4th DCA 1996). As the *Iteka* court explained, "[a]bsent extraordinary circumstances, proper notice should include written notice served a reasonable time before the time specified for the hearing." *Id.* at 206 (quoting *Ingaglio v. Ennis*, 443 So. 2d 459, 460 (Fla. 4th DCA 1984)).

[1] Review of orders entering a default or granting or denying motions to vacate a default are subject to the abuse of discretion standard; thus, the failure to enter a default is likewise reviewed for abuse of discretion. *See Mercer v. Raine*, 443 So. 2d 944 (Fla. 1984); *Net One, LLC v. Christian Telecom Network, LLC*, 901 So.2d 417 (Fla. 5th DCA 2005).

In the instant case, the Bogdanoffs filed a Motion to Abate in response to Broken Sound's complaint. Even when construing the term "paper" in a non-liberal manner, a motion to abate would still fall within the definitional ambit of "paper." The motion to abate clearly informed Broken Sound of the Bogdanoff's intent to contest the claim.[2] Hence, the Bogdanoffs were entitled to notice of the application of default by Broken Sound.

In denying Robert's Motion for Relief from Default, the lower court found that Robert was provided with notice of the default at the June 16, 2009 hearing where Broken Sound's *ore tenus* motion for default was made. Further, the lower court found that Robert had an opportunity to defend the *ore tenus* motion for default but "failed to give a reason why the Motion for Default should not be granted." However, the Third District's holding in *Molina* limits a court's ability to grant an *ore tenus* motion for default, even if the defaulting party is present, absent extraordinary circumstances. Robert was not provided with any notice of Broken Sound's intention to file a default prior to the *ore tenus* motion at the June 16, 2009 hearing. Contrary to the lower court's finding, Robert was not provided with reasonable "notice" or an "opportunity to defend" as dictated by the Fourth District. *See Iteka*, 671 So. 2d 204. Moreover, in its order, the lower court did not state any "extraordinary circumstances" that would warrant granting Broken Sound's *ore tenus* motion for default. Robert should have been served with written notice of the application for default a reasonable time before the specified hearing. Accordingly, the lower court's entry of default was improperly granted against Robert or alternatively, the lower court's Order Denying Robert Bogdanoff's Verified Motion for Relief from Default should have been granted.

[2] Even though the Motion to Abate was not signed by L.B., it still provided notice to Broken Sound of L.B.'s intent to contest the claim. Moreover, L.B. continuously stated that she was in full agreement with R.B.'s assertions, motions and actions taken on her behalf. As such, the "paper" filed by R.B. is imputed to L.B. and thus requires that L.B. receive the same notice of application for default as R.B.

The lower court's denial of Lori's Motion for Relief from Default, however, was proper. On July 21, 2009, the lower court filed an Order Setting Hearing for Clarification of Default as to Lori to be heard on August 13, 2009. The lower court set this hearing because Lori was not present at the June 16, 2009 hearing and wanted to assure Lori had proper notice and an opportunity to be heard before having a default entered against her. At the August 13, 2009 hearing, Lori again was not present but was represented by Mr. Shane Farnsworth, Esq. via a self-described "limited appearance." Mr. Farnsworth assured the court that Lori was aware of all the salient facts of the case and was in full agreement with Robert's assertions, motions, and actions taken on her behalf. Mr. Farnsworth offered no excuse for Lori's failure to answer Broken Sound's complaint and did not request an opportunity to answer. Lori had ample notice and more than a reasonable amount of time to file any pleadings in preparation for the August 13, 2009 hearing which was clearly labeled a Hearing for Clarification of Default as to Lori Bogdanoff. Therefore, the lower court's entry of default was properly granted against Lori at the August 13, 2009 hearing or alternatively, the lower court's Order Denying Lori Bogdanoff's Verified Motion for Relief from Default was not an abuse of discretion.

Therefore, the Order Denying Lori Bogdanoff's Verified Motion for Relief from Default is AFFIRMED. However, the Order Denying Robert Bogdanoff's Verified Motion for Relief from Default is REVERSED, the default judgment entered against Robert Bogdanoff is vacated, and this cause is REMANDED to the lower court for further proceedings consistent with this opinion.

BARKDULL, COX, and McCARTHY, JJ., concur.