

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

APPELLATE DIVISION (CIVIL): AY  
CASE NO.: 2016AP900033CAXXMB  
L.T. NO.: 2004CC009652XXXXMB

JEREMY MARQUISE CARTER,  
Appellant,

v.

PALM BEACH COUNTY  
SHERIFF'S OFFICE,  
Appellee.

Opinion filed:

MAY 01 2017

Appeal from the County Court in and for Palm Beach County,  
Judge Ted Booras

For Appellant:      Jeremy Marquise Carter, *pro se*  
Register No. 71851-004  
Federal Correctional Institution Estill  
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Estill, SC 29918

For Appellee:      Harriet R. Lewis, Esq.  
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PER CURIAM.

We reverse the entry of final summary judgment against Appellant/Plaintiff, Jeremy Marquise Carter ("Carter"), and in favor of Appellee/Defendant, Palm Beach County Sheriff's Office ("PBSO"). Carter argues, and we agree, that the trial court erred in granting PBSO's Motion for Summary Judgment because 1) summary judgment should not have been entered without considering Carter's response or permitting his presence at the hearing on the Motion for

Summary Judgment; 2) PBSO was not entitled to judgment as a matter of law because its argument regarding section 705.105, Florida Statutes, was not pled as an affirmative defense and was thus waived, and; 3) even if the section 705.105 argument is considered, issues of material fact precluded summary judgment.

On or about March 4, 2002, Carter was arrested for the federal crimes of bank robbery and illegal possession of a firearm. After his arrest, PBSO towed Carter's vehicle to PBSO's impound lot where PBSO deputies conducted an inventory search of the vehicle and documented the items found inside the vehicle. In October of 2003, Carter sent PBSO a letter in which he alleged items from his vehicle were stolen while the vehicle was in PBSO's possession. PBSO investigated Carter's claim and concluded his "allegations of theft of property [were] unsubstantiated" because the inventory file did not list the property allegedly missing from the vehicle and Carter did not provide proof of ownership. A federal court ultimately convicted Carter of bank robbery and illegal possession of a firearm, and Carter is currently serving his sentence in federal prison.

On March 28, 2004, Carter filed a negligence action against PBSO, alleging that several valuable items went missing from his vehicle while it was in PBSO's possession due to PBSO's negligence. On January 8, 2016, PBSO filed its Motion for Summary Judgment, arguing that PBSO was not liable for the alleged loss of Carter's property pursuant to section 705.105, Florida Statutes (2001). The Motion for Summary Judgment was set for a hearing on February 17, 2016, at which Carter was scheduled to appear telephonically. On February 2, 2016, Carter filed a motion in which he sought to cancel the hearing because he was unable to appear telephonically due to his being transported to a new correctional institution.

On February 17, 2016, the trial court granted the Motion for Summary Judgment. After

granting Defendant's Motion for Summary Judgment but before entering final judgment, the trial court received Carter's Sworn Response in Opposition to Defendant's Motion for Summary Judgment ("Response"). Though the trial court received Carter's Response on February 22, 2016, the date of mailing in the certificate of service was January 20, 2016. The federal prison from which Carter mailed the Response did not mark a date of mailing on the Response. The trial court thereafter entered final judgment, and this appeal followed.

Carter raises three issues on appeal: 1) he was denied due process by the trial court's failure to consider his Response to the Motion for Summary Judgment and his inability to appear at the hearing; 2) PBSO's argument regarding section 705.105, Florida Statutes was an unpled affirmative defense; and 3) PBSO was not entitled to judgment based upon section 705.105 because disputed issues of material fact existed. Each issue is addressed in turn.

**A. CARTER WAS DEPRIVED OF DUE PROCESS WHEN THE TRIAL COURT GRANTED THE MOTION FOR SUMMARY JUDGMENT BEFORE RECEIVING CARTER'S RESPONSE AND WITHOUT HIS PRESENCE AT THE HEARING.**

As a threshold matter, we find that Carter was deprived of due process when the trial court granted the Motion for Summary Judgment because: 1) the trial court did not reschedule the hearing on PBSO's Motion for Summary Judgment based upon Carter's inability to appear; and 2) the trial court did not consider Carter's timely Response to PBSO's Motion for Summary Judgment. Together, Carter was denied a meaningful opportunity to be heard.

Due process requires that "a party against whom a motion for summary judgment is filed [be] entitled to notice and a meaningful opportunity to be heard . . . ." *Greene v. Seigle*, 745 So. 2d 411, 411 (Fla. 4th DCA 1999) (citing *Mondestin v. Duval Fed. Sav. & Loan Ass'n*, 500 So.2d 580 (Fla. 4th DCA 1986)). "[T]he non-moving party must have a full and fair opportunity to contest the proposition that there is no genuine issue of material fact . . . ." *Natiello v. Winn-*

*Dixie Stores, Inc.*, 203 So. 3d 209, 210 (Fla. 4th DCA 2016) (citing *Phillips 66 Co. v. Int'l Tele-Coin Co.*, 564 So.2d 1219, 1220 (Fla. 3d DCA 1990)). Moreover, “[a]n incarcerated party has a right to be heard in civil matters if the party has brought to the court's attention his or her desire to appear personally or telephonically.” *Garrett v. Pratt*, 128 So. 3d 928, 929 (Fla. 5th DCA 2013) (citing *Johnson v. Johnson*, 992 So.2d 399, 401 (Fla. 1st DCA 2008)).

Trial courts “should ensure that the necessary arrangements are made with the Department of Corrections to permit [the incarcerated litigant’s] participation.” *Helm v. Foote*, 841 So. 2d 639, 642 (Fla. 2d DCA 2003) (holding that a trial court erred by not directing the Department of Corrections to allow an incarcerated inmate to appear telephonically at a hearing on a motion to set aside a dismissal); *see also Hubsch v. Howell Creek Reserve Cmty.*, 155 So. 3d 474, 475-76 (Fla. 5th DCA 2015) (holding that a trial court erred in holding a summary judgment hearing without giving the incarcerated litigant an opportunity to appear telephonically).

Carter informed the trial court fifteen days before the hearing on the Motion for Summary Judgment that he was going to be transferred from his correctional institution and his appearance was therefore impossible. Similar to the incarcerated litigants in *Hubsch* and *Helm*, Carter was unable to attend the hearing for reasons beyond his control. We find that under the circumstances, Carter was denied due process when the trial court ruled upon the Motion for Summary Judgment without rescheduling the hearing. This is particularly true in the instant case because the trial court also granted the Motion for Summary Judgment without receiving and considering Carter’s Response to the Motion for Summary Judgment.

As established by the “mailbox rule,” Carter’s Response was deemed filed the day he handed it to prison officials. *Thompson v. State*, 761 So. 2d 324, 326 (Fla. 2000). Because the

prison did not provide a time and date stamp on the Response, it was presumed filed on the date in the certificate of service, which was January 20, 2016. *See Griffin v. Sistuenck*, 816 So. 2d 600, 601-03 (Fla. 2002) (finding the certification “I, Walter Griffin, certif[y] that a true and correct copy has been furnished via U.S. Mail” satisfies the “mailbox rule”). We recognize that although the Response was deemed filed pursuant to the mailbox rule on January 20, 2016, the Response was not docketed until February 22, 2016. Thus, the trial court inadvertently granted the Motion for Summary Judgment before considering Carter’s timely filed Response.<sup>1</sup> For the foregoing reasons, we find that Carter was deprived of a meaningful opportunity to be heard. Therefore, the entry of summary judgment must be reversed.

**B. THE TRIAL COURT ERRED IN GRANTING PBSO’S MOTION FOR SUMMARY JUDGMENT BECAUSE THE MOTION RAISED AN AFFIRMATIVE DEFENSE NOT PROPERLY RAISED IN THE PLEADINGS.**

Although we find that the denial of due process requires reversal, we address the merits of PBSO’s Motion for Summary Judgment in order to avoid duplicative error on remand. Carter argues, and we agree, that the trial court erred in granting the Motion for Summary Judgment because PBSO improperly raised an affirmative defense based upon section 705.105, Florida Statutes, for the first time in the Motion for Summary Judgment.

Florida Rule of Civil Procedure Rule 1.110(d) provides that “a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense.” Moreover, “[f]ailure to plead an affirmative defense waives that defense.” *Goldberger v. Regency Highland Condo. Ass’n, Inc.*, 452 So. 2d 583, 585 (Fla. 4th DCA 1984); *see also* Fla. R. Civ. P. 1.140(b)

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<sup>1</sup> Although the trial court lacked the benefit of a docketed Response at the time it granted the Motion for Summary Judgment, the Response was docketed at the time the trial court entered final judgment. As the order granting the Motion for Summary Judgment was interlocutory, the court had inherent authority to revisit, even *sua sponte* in these circumstances, its ruling and consider the timely Response prior to entering final judgment. *Nationsbank, N.A. v. Ziner*, 726 So. 2d 364, 366 n.1 (Fla. 4th DCA 1999).

(“Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading . . .”).

In its Motion for Summary Judgment, PBSO argued that it was entitled to judgment as a matter of law based upon section 705.105, Florida Statutes. Section 705.105 provides that “[t]itle to unclaimed evidence or unclaimed tangible personal property lawfully seized pursuant to a lawful investigation” vests in the law enforcement agency that seized the property sixty days after the case concludes. We find that this argument is an affirmative defense. *See Storchwerke, GMBH v. Mr. Thiessen's Wallpapering Supplies, Inc.*, 538 So. 2d 1382, 1383 (Fla. 5th DCA 1989) (“[A]n affirmative defense is a pleading that, in whole or part, bars or voids the cause of action asserted by an opponent in the preceding pleading . . .”).

Because PBSO did not raise its section 705.105 affirmative defense in the pleadings, but rather raised it for the first time in the Motion for Summary Judgment, it was waived. *See Fink v. Powsner*, 108 So. 2d 324, 326 (Fla. 3d DCA 1958) (“[T]he court properly rejected the . . . attempt to inject an affirmative defense on motion for summary judgment as it was beyond the scope of the issues raised by the pleadings.”). Accordingly, the trial court erred in granting the Motion for Summary Judgment because PBSO failed to properly raise its affirmative defense in the pleadings as required by the Florida Rules of Civil Procedure.

**C. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW PURSUANT TO SECTION 705.105, FLORIDA STATUTES (2001).**

We write briefly to note that even if PBSO had properly pled the section 705.105 affirmative defense, summary judgment would nonetheless be improper because issues of material fact remain in dispute. In order for a law enforcement agency to gain title to unclaimed property pursuant to section 705.105, the property must be “lawfully seized as evidence by and

in the custody of a law enforcement agency . . . .” *Strickland v. Thelman*, 665 So. 2d 284, 286 (Fla. 5th DCA 1995). Central to the section 705.105 analysis is whether the property was “lawfully seized as evidence by and in the custody of a law enforcement agency . . . .” *Id.* at 286. The parties dispute whether the subject property is, or ever was, in PBSO’s possession. Thus, an issue of material fact remains.

Because the trial court erred in granting PBSO’s Motion for Summary Judgment, we **REVERSE** the final judgment and **REMAND** the case for further proceedings consistent with this Opinion.

GILLEN, ROWE, and HAFELE, JJ., concur.



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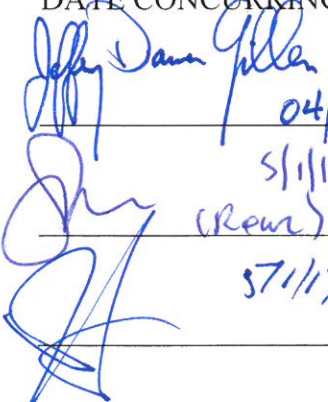
Appealed: March 11, 2016

DATE OF PANEL: FEBRUARY 21, 2017

PANEL JUDGES: GILLEN, ROWE, HAFELE

AFFIRMED/REVERSED/OTHER: REVERSED AND REMANDED

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:	)	DISSENTING:	)	CONCURRING SPECIALLY:	)
	)	With Opinion	)	With/Without Opinion	)
 04/28/17	)		)		)
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