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

EDWARD J. GARCES

Appellant,

v.

NATIONWIDE HOME EQUITY CORP. and MRS X2 INC.,

Appellees.
_____/

APPELLATE DIVISION (CIVIL)
CASE NO.: 502008AP000024XXXXMB
L.T.: 502007CC016017XXXXNB
Division: 'AY'

Opinion filed: July 29, 2009

Appeal from: The County Court, in and for Palm Beach County, Florida
Judge Cory J. Ciklin

For Appellant: Alan P. Dagen, Esq.
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For Appellees: Woodie H. Thomas, III, Esq.
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PER CURIAM.

REVERSE and REMAND.

Appellant, Edward Garces, seeks review of the Final Summary Judgment entered in favor of the Appellees, Nationwide Home Equity Corp. and Mrs. X2 Inc. Garces argues that the trial court denied him his constitutional right of due process by not providing proper notice before entering final summary judgment. We agree and reverse.

Appellees filed a complaint against Garces alleging breach of contract, quantum meruit, and unjust enrichment for an unpaid mortgage fee pursuant to a Mortgage Broker Contract. An

order setting nonjury calendar call and pretrial procedures was entered. The case was ultimately disposed of when final summary judgment was entered in favor of the Appellees following the scheduled calendar call. No motion for summary judgment was filed by either party and no such motion was set for hearing.

Trial judges are empowered to grant summary judgment on their own motion at a pretrial conference without prior motion by any party, provided that they exercise such power "with an abundance of caution." Savage-Hawk v. Premier Outdoor Prod. Inc., 474 So. 2d 1242, 1244 (Fla. 2d DCA 1985); Bess v. 17545 Collins Ave., Inc., 98 So. 2d 490, 491-92 (Fla.1957); Roberts v. Braynon, 90 So. 2d 623, 626 (Fla. 1956); Ferguson v. V.S.L. Corp., 528 So. 2d 32 (Fla. 3d DCA 1988). Although not explicit in Rule 1.200, the power to grant summary judgment *sua sponte* at a pretrial conference derives, implicitly, from the power granted the court to "consider and determine...the simplification of the issues." Lombard v. Executive Elevator Serv., Inc., 545 So. 2d 453, 455 (Fla. 3d DCA 1989). When a pretrial conference is scheduled, "counsel should recognize and prepare for the possibility that at the conference the issues of fact may be simplified to the point of elimination, whereupon the court, confronted with a pure matter of law, may resolve it by summary judgment." Roberts, 90 So. 2d 623, 627.

In the event the trial court finds that final summary judgment is proper, it is necessary that the party moved against be given proper notice and be allowed an opportunity to meet the question of whether there exists a genuine issue of material fact. Muncey v. Star Brite Distributors, Inc., 378 So.2d 1326 (Fla. 3d DCA 1980); Moseley v. Bi-Lo Supermarket, Inc., 341 So.2d 222 (Fla. 3d DCA 1977). Florida Rule of Civil Procedure 1.200(c) requires twenty days notice for a pretrial conference. Likewise, Rule 1.510(c) requires that a motion for summary judgment must be served at least twenty days before a hearing on the motion. Lazar v. Allen, 347

So.2d 457 (Fla. 2d DCA 1977). The twenty day notice requirement must be strictly followed. Roberts at 626; Fruhmorgen v. Watson, 490 So. 2d 1032 (Fla. 2d DCA 1986); Savage-Hawk, 474 So. 2d 1242; *cf.*, Groeber v. Heuring, 690 So. 2d 1343, 1344 (Fla. 3d DCA 1997) (reversing summary judgment entered pursuant to oral motion made on the morning of trial for lack of mandatory notice); E & I Inc. v. Excavators Inc. 697 So. 2d 545, 546 (Fla. 4th DCA 1997) (reversible error to grant summary judgment where less than the required twenty days notice was given). Accordingly, twenty days prior to a pretrial conference, or a hearing on a motion for summary judgment, notice must be provided to the parties.

In addition, summary judgment is only appropriate when the material facts are not in dispute and the judgment is based upon the legal construction of documents. See Castle Constr. Co. v. Huttig Sash & Door Co., 425 So.2d 573, 575 (Fla. 2d DCA 1982). The Final Order in the present case indicates that the court not only reviewed the documents but also listened to testimony. Under Florida Rule of Civil Procedure 1.510, "oral testimony is inappropriate at a hearing on a motion for summary judgment." Orange Lake Country Club, Inc. v. Levin, 645 So.2d 60, 62 (Fla. 5th DCA 1994); see also Campbell Settle Pressure Grouting & "Gunite" Co. v. David M. Abel Constr. Co., 395 So.2d 247, 248 (Fla. 3d DCA 1981) (holding that even in the absence of an objection, trial court reversibly erred when it considered oral testimony at a summary judgment hearing in order to resolve genuine issues of material fact).

A case should not be dismissed without minimal procedural safeguards. Surat v. Nu-Med Pembroke, Inc., 632 So.2d 1136 (Fla. 4th DCA 1994). The only notice received by the Appellant was for calendar call, which stated:

> At the calendar call you will receive an actual date and time for the trial during the (3) week docket period immediately following calendar call. ... The court will attempt to schedule your trial (during the three week docket period) on a day and time that all parties and witnesses will be available. DO NOT BRING YOUR

WITNESSES TO THE CALENDAR CALL but be able to inform the court of their availability during the (3) week docket period.

Unlike a notice for a pretrial conference, Appellant was never placed on notice to prepare for the possibility of simplifying the issues and as a result was not afforded the protection of Rule 1.510(c). One object of the rules of procedure is to prevent surprise and this objective should not be overlooked. See Nielsen v. Carney Groves, Inc., 159 So.2d 489 (Fla.2d DCA 1964).

We hold that the trial court erred by entering final summary judgment without proper notice. Although not raised by the parties, the Court notes that oral testimony should not have been considered prior to granting final summary judgment. Accordingly, we reverse the trial court's order entering final summary judgment and remand for further proceedings consistent herewith. This opinion shall not preclude the trial court from considering a properly noticed motion for summary judgment with appropriate supporting affidavits or discovery. Appellee's Motion for Attorney's Fees is **DENIED.**

GARRISON, FINE, and CROW, JJ., concur.