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

APPELLATE DIVISION (CIVIL): AY
CASE NO.: 502014AP000022
L.T. NO.: 502011CC0017304

NORTHFIELD HOLDING CORP.,
Appellant,

Opinion/Decision filed: MAY 12 2015

v.

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

CLAIRE YASSA
Appellee.

Date of Appeal: May 12, 2014

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Opinion filed: MAY 12 2015

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

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PER CURIAM.

Appellant/Defendant Northfield Holding Corporation ("Northfield") appeals the trial court's denial of its Motion to Vacate Default and Final Judgment. Northfield argues that the judgment was void because the Appellee/Plaintiff, Claire Yassa, did not perfect service of process on Florida Window Company, LLC ("Florida Window"). Yassa argues that 1) Northfield lacks standing to bring this appeal, and 2) the appellate court should affirm the denial of the motion to vacate because there is no record on appeal to demonstrate that the trial court

erred.

We find that 1) Florida Window is the party appealing and Northfield being listed as the appellant is a scrivener's error; 2) the trial court erred in not holding an evidentiary hearing on Northfield's Motion to Vacate Default and Final Judgment to determine whether service of process was perfected on Florida Window Company, LLC; 3) Yassa is not entitled to attorney's fees because Florida Window's admissions through default does not constitute clear and convincing evidence; and 4) Florida Window's motion for appellate costs is not properly before this court.

A recitation of this case's procedural history is necessary to demonstrate why Northfield being listed as the appellant is a scrivener's error and why an evidentiary hearing was required. Yassa filed a Complaint against Florida Window, a Limited Liability Company registered in Florida, for damages in the amount of $15,000.00. The return-of-service, filed on September 7, 2012, indicated that Florida Window was served on September 4, 2012, by corporate service through Claire O' Bringer as "clerk for Florida Window". Florida Window did not file an answer, and Yassa filed a Motion for Default. An Affidavit of Service was attached to the motion stating that 1) process was served on Florida Window, 2) Scott Berman was Florida Window's registered agent, and 3) the address for service was 11360 Jog Road, Suite 102, Palm Beach Gardens, Florida. The affidavit further stated that Florida Window was served at 11360 Jog Road, Suite 102, Palm Beach Gardens, Florida on Cindy O'Bringer as clerk for Florida Window on September 4, 2012 at 10:20 a.m.

The trial court entered a default and a Final Default Judgment against Florida Window. Yassa filed a Motion to Compel Response to Request for Production in Aid of Execution, which was granted. Florida Window failed to produce the requested documents and Yassa then filed a

Motion to Show Cause which was granted; Florida Window was ordered to appear in court. Florida Window failed to appear, and the trial court held Florida Window in willful contempt of the trial court's order and issued a writ of bodily attachment for Florida Window. The Writ of Bodily Attachment was executed and Berman deposited the amount of the final judgment in the court registry.

Florida Window filed a Motion to Vacate Default and Final Default Judgment ("Motion to Vacate") stating in relevant part that 1) Florida Window had no knowledge of this action until Berman was detained pursuant to a writ of bodily attachment; and 2) the judgment is void due to improper service. Yassa filed a response, and a fifteen minute special set hearing was held on the Motion to Vacate. The trial court entered an order denying the Motion to Vacate after "having heard argument of counsel and being otherwise fully advised of the premises". In the caption of the order, the trial court listed Northfield Holding Corp. D/B/A, Florida Window and Door as the defendant rather than Florida Window. A Notice of Appeal was timely filed seeking review of the denial of its Motion to Vacate. The Notice of Appeal also listed Northfield Holding Corp. D/B/A, Florida Window and Door as the defendants in the caption of the order, and it indicates that Northfield Holding Corp. D/B/A, Florida Window and Door is the party seeking review of the trial court's order.

A. Clerical or Scrivner's Error on Notice of Appeal

Florida Window rather than Yassa is the party bringing this appeal, and Northfield being listed on the notice of appeal is a clerical or scrivner's error. The test to determine whether a notice of appeal is sufficient is 1) whether the notice gives the adverse party and the appellate court sufficient information to determine which order or judgment is intended to be appealed, and 2) whether the adverse party was misled or prejudiced by the mistake in the notice of appeal.

Greyhound Corp. v. Carswell, 181 So. 2d 638, 640 (Fla. 1966). The essential part of the test is whether the adversary was prejudiced by the mistake. *Id.* "[S]tatutes [and rules] giving a right of appeal should be liberally construed in the interest of manifest justice." *State ex rel. Dedmon v. Carroll*, 151 So. 2d 5, 9 (Fla. 1963) (citing *Seaboard Air Line Railroad Co. v. Holt*, 80 So. 2d 354 (Fla.1955)).

In this instance, Florida Window filed a notice of appeal that named Northfield Holding Corporation D/B/A, Florida Window and Door as the defendant in the action when the judgment being appealed was against Florida Window Company, LLC. Such an error occurred pursuant to the trial court's order denying Florida Window's Motion to Vacate in which the trial court listed Northfield Holding Corporation D/B/A, Florida Window and Door as the defendant in the action rather than Florida Window Company. All court filings prior to the entry of the order denying the Motion to Vacate, listed the defendant as Florida Window, and there are no orders substituting parties or amending parties. At all times in the lower court proceeding, there were only two parties to the case: Florida Window and Yassa. *See State ex rel. Dedmon v. Carroll*, 151 So. 2d 5, 9 (Fla. 1963) (holding that the mistake in the notice of appeal that stated that the appeal was taken by the defendant rather than the plaintiff was a clerical error and the notice of appeal was sufficient because there was only one plaintiff and one defendant in the case, all papers filed subsequent to the notice of appeal stated the parties' names correctly and there was no inconvenience or prejudice to the parties).

Additionally, despite the error on the notice of appeal, the notice of appeal served its function to put Yassa on notice of the appeal. The notice of appeal stated that the appeal was of the trial court's April 16, 2014 order, which denied Florida Window's Motion to Vacate, and the briefs submitted by both parties indicated that the order being appealed was against Florida

Window and not Northfield. *See Greyhound Corp. v. Carswell*, 181 So. 2d 638, 640 (Fla. 1966) (holding that the even though the notice of appeal incorrectly stated the order to be appealed, because the appellee was on notice of what order was being appealed and the appellee was not unduly prejudiced by the error, the appeal should not be dismissed). Accordingly, the mistake by Florida Window in the notice of appeal is a clerical or scrivner's error that does not unduly prejudice Yassa as to require this Court to dismiss this appeal.

B. Florida Window's Motion to Vacate Default and Final Default judgment.

The Trial Court Abused its discretion in denying Florida Window's Motion to Vacate. "A motion for relief from judgment should not be summarily dismissed without an evidentiary hearing unless its allegations and accompanying affidavits fail to allege 'colorable entitlement' to relief." *Schuman v. Int'l Consumer Corp.*, 50 So. 3d 75, 77 (Fla. 4th DCA 2010) (quoting *Smith v. Smith,* 903 So. 2d 1044, 1045 (Fla. 5th DCA 2005)). "[W]here the contents of an affidavit supporting a defendant's contention of insufficiency of service would, if true, invalidate the purported service and nullify the court's personal jurisdiction over the defendant, the trial court should hold an evidentiary hearing before deciding the issue." *Se. Termite & Pest v. Ones*, 792 So. 2d 1266, 1268 (Fla. 4th DCA 2001). An evidentiary hearing should be held regardless of whether the parties request such hearing. *Novastar Mortg., Inc. v. Bucknor*, 69 So. 3d 959, 960 (Fla. 2d DCA 2011). "It is reversible error for a trial court to deny a party an evidentiary hearing to which he is entitled." *Sperdute v. Household Realty Corp.*, 585 So. 2d 1168, 1169 (Fla. 4th DCA 1991).

Florida Window argues that they were not notified of a trial court proceeding. Specifically, Florida Window asserts that it was not properly served. Florida Window is a limited liability company and thus, it could be served as a partnership or through a registered agent. § 608.463, Fla. Stat. (2012). A partnership is served by serving any partner, or if a

partner is not available during regular business hours, the partner may designate an employee to accept service. § 48.061, Fla. Stat. (2012). After one attempt to serve a partner or designated employee, the person in charge of the partnership during regular business hours may be served. *Id.* Because limited liability companies do not have partners, members of limited liability companies are considered the individuals who must be served. *Mead v. HS76 Milton, LLC*, 102 So. 3d 682, 683 (Fla. 1st DCA 2012), *reh'g denied* (Dec. 27, 2012).

As to service through Florida Window's registered agent, the registered office must be open and a registered agent must be at the office daily between 10 a.m. and 12 p.m. except on Saturdays, Sundays, and legal holidays. § 48.091, Fla. Stat. (2012). The statutory establishment of time and place to serve a registered agent does not limit when service can be made, it simply provides for the minimum availability of a registered agent. *Ludwig v. Schweigel*, 701 So. 2d 1256, 1257 (Fla. 5th DCA 1997); Registered Office and Registered Agent; Service of Process on Corporations, CP FL-CLE 4-1. If a corporation fails to keep the registered agent at the registered office during the proper hours, then the process server may serve any corporate employee or any employee of the registered agent. § 48.081(3), Fla. Stat. (2012).

Florida Window's Motion to Vacate asserted that O'Bringer was not an employee of Florida Window at the time service was attempted. Florida Window also filed an affidavit of Claire O'Bringer which stated that Claire O'Bringer worked for Northfield, rather than Florida Window, at the time of service. If the allegations in the Motion to Vacate and affidavit were true that O'Bringer did not work for Florida Window at the time of service, then service upon O'Bringer would not perfect service as to Florida Window as she was not 1) a member of the limited liability company, 2) a designated agent, 3) a the person in charge of the company, 4) a registered agent, or 5) an employee of the company or registered agent. *See Robles-Martinez v.*

Diaz, Reus & Targ, LLP, 88 So. 3d 177, 181 (Fla. 3d DCA 2011) (recognizing that the appellants challenged the validity of service which was a fact issue and required an evidentiary hearing). Because the allegation that Florida Window was not served has a "colorable entitlement" to relief from the final default judgment entered by the trial court, the trial court was required to hold an evidentiary hearing to determine whether service was perfected on Florida Window. *See SunTrust Bank v. Puleo*, 76 So. 3d 1037, 1039 (Fla. 4th DCA 2011) (holding that an evidentiary hearing was required when the garnishor's motion raised a colorable claim for relief from a default judgment).

The trial court held a fifteen minute specially set hearing on Florida Window's Motion to Vacate, but it was not evidentiary in nature. *See Herranz v. Siam*, 2 So. 3d 1105, 1106 (Fla. 3d DCA 2009) (reversing and remanding the granting of a motion to set aside a default for the trial court to hold a properly noticed evidentiary hearing). Accordingly, because Florida Window's Motion to Vacate stated a colorable claim for relief, the trial court abused its discretion in not holding an evidentiary hearing.

C. Yassa's Motion for Appellate Attorney's Fees

Yassa is not entitled to appellate attorney's fees pursuant to Florida Statute section 772.11(1). Section 772.11(1) states in relevant part that:

> Any person who proves by clear and convincing evidence that he or she has been injured in any fashion by reason of any violation of ss. 812.012-812.037 or s. 825.103(1) has a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200, and reasonable attorney's fees and court costs in the trial and appellate courts.

In this case, the trial court entered a final default judgment in Yassa's favor. When a default judgment is entered only the well-pleaded allegations are deemed admitted. *Mullne v. Sea-Tech Const. Inc.*, 84 So. 3d 1247, 1249 (Fla. 4th DCA 2012). The defendant does not admit to facts that are not well pleaded or conclusions of law. *Id.*

Count III of Yassa's complaint claims that Florida Window violated sections 812.014, 812.0145, and 825.103, Florida Statutes, because Florida Window knowingly deprived Yassa of property with the intent to permanently 1) deprive Yassa of the property, and 2) appropriate the property. Such allegation states a claim for the civil theft. *See* § 812.014, Fla. Stat. (2011). Although Florida Window admitted to the allegations through default, such admissions do not rise to the level of clear and convincing evidence. In *Tobin*, the Supreme Court of Florida held that admissions deemed admitted due to the defendant's failure to respond to a request for admissions constituted substantial competent evidence to support findings. *The Florida Bar v. Tobin*, 674 So. 2d 127, 128 (Fla. 1996). Similarly to *Tobin*, Florida Window did not respond to a pleading and as such, the well pleaded facts were deemed admitted. Even though Florida Window is deemed to have admitted civil theft by failing to respond and the entry of a default and default judgment, such admissions are not proof by clear and convincing evidence that Yassa was injured by Florida Window's civil theft. Accordingly, it is recommended that Yassa not be entitled to appellate attorney's fees.

D. Florida Window's Motion for Appellate Costs

Florida Window seeks appellate costs pursuant to Florida Rule of Appellate Procedure 9.400(a) which states that costs must be taxed in favor of the prevailing party. "Costs shall be taxed by the lower tribunal on motion served within 30 days after issuance of the mandate." Fla. R. App. P. 9.400. In this instance, the mandate has not been issued and thus, Florida Window's motion for costs was improperly filed. Therefore, because such motion should be filed in the trial court after the mandate is issued, the issue of appellate costs is not properly before the Court.

Therefore, this Court **REVERSES** the trial court's order denying the Motion to Vacate and **REMANDS** for the trial court to hold an evidentiary hearing on Florida Window's Motion to Vacate and specifically address whether service was properly perfected on Florida Window, Yassa's Motion for Attorney's fees is **DENIED**, and Florida Window Company, LLC's Motion for appellate costs is **DENIED**.

J. KEYSER, COX, and BURTON, JJ., concur.