NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

JOSEPH WASHINGTON, JR.,
Appellant,

v.

USF FEDERAL CREDIT UNION,
Appellee.
_____/

UCN: 512018AP000074APAXES
Case No.: 18-AP-74
Lower No.: 17-CC-2145

On appeal from Pasco County Court,
Honorable William G. Sestak

Joseph Washington, Jr., *pro se*,
for Appellant.

No response,
for Appellee.

ORDER AND OPINION

Because Plaintiff-Appellee failed to address Defendant-Appellant's affirmative defenses in its motion for summary judgment and affidavit, and the trial court failed to address the affirmative defenses in its final judgment that granted Appellee's motion for summary judgment, the trial court's final judgment and corresponding attorney fee award must be reversed. Because this issue warrants reversal by itself, the Court does not address Appellant's remaining arguments.

STATEMENT OF THE CASE AND FACTS

Appellee University of South Florida Federal Credit Union brought a Third Amended Complaint against Appellant Joseph Washington, Jr. for breach of contract and damages for failing to pay on a loan agreement. In the Complaint, Appellee asserted that the parties had entered into a contract, that Appellant had not paid Appellee pursuant to the terms of the contract, and that Appellant therefore owed Appellee damages of $14,918.67. Attached to the Complaint was a document that Appellee asserted was a

loan agreement. The document is entitled "Advance Receipt and Truth-In-Lending Statement." It is signed by Appellant but not by a representative of Appellee.

Appellant filed an Answer and Affirmative Defenses. Appellant denied that the document attached was a contract and denied damages, writing "[i]n that Plaintiff did not provide a contract per se, the allegations in this paragraph are denied."

Appellant raised five affirmative defenses: (1) that the Complaint failed to state a cause of action; (2) that Appellee did not satisfy any applicable condition precedent to suit; (3) that Appellee failed to mitigate damages; (4) that Appellant is entitled to "set-off from damages . . . for interim earnings, or for any amounts recovered or which reasonably could have been recovered, by plaintiff through plaintiff's efforts to mitigate damages or through recovery from a collateral source;" and (5) "handwritten notes [specifically the word "Work Out" on the top of the first page of Complaint Exhibit A] indicate a modification was made, entitling Defendant to relief from damages based on the revised terms of the work-out and negating the award of damages to plaintiff."

Appellee filed an unsworn response to Appellant's affirmative defenses that consisted of a single sentence denial. There was no affidavit or other documentation or evidence attached to the response. Appellee also filed a motion for summary judgment and attorney fees. An affidavit was attached to the summary judgment motion. However, neither the motion nor the affidavit addressed Appellant's affirmative defenses.

The trial court held a hearing on the motion on August 27, 2018, but it was either not recorded or not transcribed. Appellant later attempted to submit a Statement of Evidence or Proceedings. *See* Fla. R. App. P. 9.200(b)(5). However, the trial court refused to approve the statement because it did not accurately reflect what occurred during the motion hearing. This Court affirmed the trial court's order on the statement. Thus, there is no transcript or statement in the record regarding the hearing on the motion for summary judgment.

The trial court issued a written Final Judgment that granted the motion for summary judgment and entered a final judgment in favor of Appellee. The final judgment also awarded Appellee attorney fees totaling $750.00.

STANDARD OF REVIEW

"The standard of review of a summary judgment order is *de novo* and requires viewing the evidence in the light most favorable to the non-moving party." *Skelton v. Real Estate Sols. Home Sellers, LLC*, 202 So. 3d 960, 961 (Fla. 5th DCA 2016) (quoting *Sierra v. Shevin*, 767 So.2d 524, 525 (Fla. 3d DCA 2000)

The standard of review for a trial court's ruling on the admissibility of evidence is abuse of discretion. *Jackson v. State*, 107 So. 3d 328, 339 (Fla. 2012). However, that discretion is limited by the rules of evidence. *Id*. If the reviewing court finds that the trial court abused its discretion, the error is subject to harmless error analysis. *Id*. at 342-43.

Generally, where no transcript of a proceeding is made, an appellate court cannot reverse unless there is an error on the face of the trial court's order. Additionally, the error complained of must be a harmful error resulting in a miscarriage of justice. *Harris v. McKinney*, 20 So. 3d 400, 405-06 (Fla. 2d DCA 2009) (citations and quotations omitted).

However, the lack of a transcript does not automatically foreclose appellate review of an order ruling on a motion for summary judgment. *Johnson v. Deutsche Bank Nat'l Trust Co. Ams.*, 248 So. 3d 1205, 1210-11 (Fla. 2d DCA 2018). Where the summary judgment evidence in the form of pleadings, attachments thereto, and affidavits demonstrate that genuine issues of material fact remain, a transcript of the summary judgment hearing is not necessary. *Id*.; *Misha Enters. v. GAR Enters., LLC*, 117 So. 3d 850, 853-54 (Fla. 4th DCA 2013).

LAW AND ANALYSIS

I. Motion for Summary Judgment Did Not Address Affirmative Defenses

Where a plaintiff moves for summary judgment after the defendant raises affirmative defenses, the motion for summary judgment must factually refute or disprove the affirmative defenses raised, or establish that the defenses are insufficient as a matter of law. *Misha*, 117 So. 3d at 853. The burden of proving the existence of genuine issues of material fact does not shift to the defendant until the plaintiff has met its burden to disprove or refute the affirmative defenses. *Johnson*, 248 So. 3d at 1207-1208 (quoting *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So. 3d 251, 253 (Fla. 2d DCA 2011)). Even where there is no transcript of the summary judgment motion hearing, an appellate

court can still conduct *de novo* review of a summary judgment hearing on a case-by-case basis. *Johnson*, 248 So. 3d at 1210 (citing *Houk v. PennyMac Corp.*, 210 So. 3d 726, 731 (Fla. 2d DCA 2017)).

In *Johnson*, Deutsche Bank National Trust Company Americas, as Trustee RALI 2007-QS1 (RALI), instituted a residential foreclosure action against the Johnsons. *Id*. at 1206. The Johnsons raised multiple affirmative defenses, including standing. *Id*. at 1207. RALI filed a motion for summary judgment, attaching an affidavit by an employee of PNC Mortgage asserting that PNC Mortgage was the servicer of the loan. *Id*. RALI relied upon that affidavit to argue in the motion that they were the holder of the mortgage note and therefore had standing. *Id*. A hearing on the motion was held but was not transcribed. *Id*. at 1209. The trial court granted the summary judgment motion. *Id*. at 1206.

On appeal, the Second District Court of Appeal wrote that RALI's "standing – challenged, as it was, by the Johnsons' affirmative defense – fell well short of what was required for a summary adjudication." *Id*. at 1208. Specifically, the Second District held that the PNC Mortgage employee was not in any way affiliated with RALI and that the employee's affidavit failed to state how she obtained her knowledge of RALI's connection to the Johnsons' note or how RALI had become an owner or holder of the Johnsons' note. *Id*. As a result, the Second District reversed the summary judgment order. *Id*. at 1211.

In *Misha*, GAR Enterprises and Misha Enterprises entered into a business lease. GAR brought a complaint for declaratory judgment, damages for breach of contract, and commercial eviction. *Misha*, 117 So. 3d at 851. Misha raised several affirmative defenses, the fourth of which asserted a set-off of $100,000 for loss of business due to actions taken by GAR. *Id*. at 852. GAR moved for summary judgment and moved to strike Misha's affirmative defenses. *Id*. The trial court granted the motion for summary judgment but the order did not address whether it considered the affirmative defenses stricken at the time of the summary judgment order. *Id*. at 852, 853. Neither party prepared a transcript of the summary judgment hearing. *Id*. at 853.

The Fourth District Court of Appeal held that GAR's affidavit in support of summary judgment failed to address any of the allegations in Misha's fourth affirmative defense. *Id*. at 853-54. Thus, the Fourth District held, GAR had failed to demonstrate the absence

of material fact pertaining to that affirmative defense. *Id*. at 854. The summary judgement order was reversed. *Id*.

See also Houk, 210 So. 3d at 731 (holding that appellate review of an order granting a motion for summary judgment was appropriate despite the lack of a transcript because the record contained the "operative complaint, Mr. Houk's answer and affirmative defenses, the motion and order for substitution of the plaintiff, the amended motion for summary judgment, and the supporting and opposing affidavits" and therefore had "all of the portions. . . necessary for us to determine whether summary judgment was properly entered.").

As in *Johnson*, *Misha*, and *Houk*, the parties' pleadings and motions and the trial court's order are sufficient to conduct appellate review of the summary judgment proceeding despite the lack of a transcript. In the instant case, in his Answer and Affirmative Defenses, Appellant denied that the document attached to Appellee's complaint was a contract and asserted that Appellee had failed to state a claim upon which relief could be granted. He further asserted that Appellee failed to satisfy any condition precedent to suit, that Appellee failed to mitigate damages, that Appellant is entitled to a set-off from damages to Appellee for interim earnings, or any amounts recovered or which reasonably could have been recovered, through mitigation efforts, and that even if the trial court were to hold that the document attached to Appellee's third amended complaint were a contract, and that handwritten notes establish that a modification of the contract was made, entitling Defendant to relief from damages.

Neither Appellee's motion for summary judgment nor the affidavit in support thereof addressed Appellant's affirmative defenses in any way. Additionally, the trial court's order granting summary judgment did not address the affirmative defenses. While Appellee filed a reply to Appellant's affirmative defenses, the reply was an unsworn, single-lined denial that fell far below the burden required to refute an affirmative defense in a summary judgment proceeding. The trial court should have denied Appellee's motion for summary judgment. Accordingly, the trial court's order granting Appellee's motion for summary judgment must be reversed.

II. Appellant's Claim Regarding Amount of Attorney Fees is Moot

Appellant is correct that a trial court order determining the amount of attorney fees is in error where neither the record nor the written order make the factual findings required by *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985). *See Bayer v. Global Renaissance Arts, Inc.*, 869 So. 2d 1232 (Fla. 2d DCA 2004) (where the trial court does not verbally make the required *Rowe* findings during the attorney fee hearing, or where the hearing transcript is not made part of the appellate record, the trial court's written attorney fee order must contain the required *Rowe* findings and the failure to do so is reversible error).

However, Appellant's argument is now moot. Because this Order and Opinion results in the reversal of the trial court's order granting the motion for summary judgment, Appellee is no longer the prevailing party in the summary judgment proceeding. Therefore, Appellee is no longer entitled to attorney fees.

CONCLUSION

Because Appellee's motion for summary judgment failed to refute or even address Appellant's affirmative defenses, the trial court's final judgment granting summary judgment must be reversed.

Because the final judgment granting summary judgment must be reversed, Appellee's entitlement to attorney fees must also reversed. Thus, Appellant's argument that the trial court erred in determining the amount of the attorney fee award is now moot.

Because the claim that the motion for summary judgment failed to address Appellant's affirmative defenses results in reversal of the trial court's order by itself, this Court does not reach Appellant's remaining claims.

It is therefore ORDERED and ADJUDGED that the final judgment of the trial court is hereby REVERSED and the case REMANDED for proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ___ day of _____, 2020.

Original Order entered on May 18, 2020, by Circuit Judges Daniel D. Diskey, Susan G. Barthle, and Kimberly Sharpe Byrd.

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